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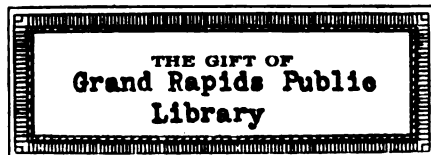
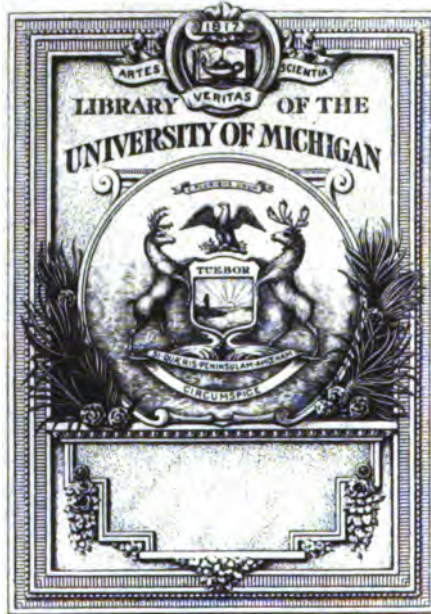
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THE
LAW OF BANKRUPTCY,
BEING
THE NATIONAL BANKRUPTCY ACT,

NOW IN FORCE,

*THE RULES, OR GENERAL ORDERS IN BANKRUPTCY, THE FORMS
IN BANKRUPTCY, NOTES, COMMENTS, CROSS-REFERENCES,
AND CITATIONS TO ALL APPLICABLE DECISIONS
UNDER THE FORMER AND PRESENT AMERICAN
ACTS, AND ENGLISH PRACTICE,*

TOGETHER WITH

THE UNITED STATES EQUITY, RULES AND A LIST OF THE
JUDGES AND CLERKS OF THE COURTS
OF BANKRUPTCY,

BY

WILLIAM A. LUBY,

*Of the Kalamazoo Bar, and Author of Patent Office Practice—an Abridgement
of the Law of Patents and the Practice of Procuring Them.*

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P R E F A C E .

The law of bankruptcy is without question one of the most important to the commercial world of any now on the statute books in this country, and it is the one with which lawyers are least familiar. The importance of the law does not rest so much in the relief which insolvent debtors derive from it, as in the fact that it permeates, is interwoven with and affects nearly every other branch of jurisprudence to such an extent that the lawyer cannot safely advise upon the most simple question unless he is familiar with its provisions. This fact was recognized when the present law was approved in 1898, and various efforts were made to provide a work on the subject suitable to the wants of the lawyer. The law, with the exception of perhaps one or two sections, is not complicated, though the text books which have heretofore been prepared make it appear extremely so. The books referred to were prepared hurriedly, and embodied about everything ever enacted or enunciated on the subject, with sufficient extraneous "padding" matter to fill that number of pages which law-book publishers deemed essential to the "dignity" of a high priced volume. The incorporation of the enactments that had been repealed, the doctrines that had been over-ruled and the decisions that had been rendered inapplicable by the new act could not be other than confusing. They were prepared before the present act had been construed, and however serviceable they may have been, the writer believes that they have served their purpose, and that the practitioner demands a work of a different type. In the hope of meeting that demand, this volume has been prepared in that manner which it is believed will best enable the lawyer to find the law and carry the thread of a subject through the decisions and every provision of the Act. To this end, the Act itself has been made the text of the book, the decisions under all the acts, so far as possible, have been generalized into rules of practice, and connected, upon the same page, with such parts of the act as they in any way affect. In addition to this, every kindred and relative provision of the Act, the Rules or or General Orders in Bankruptcy, and the Rules in Equity have been connected by cross-references, thereby bringing before the practitioner, wherever he may open the book, the entire

field of the law and practice relative to the point he may be investigating. Aside from this, particular attention has been drawn to the decisions under the present act by causing them to be set in bold-faced type, and having them appear in direct connection with the part of the act affected by them, instead of at the end of a section. This is something that has been attempted in no other work; it enables the practitioner at a glance to know, even without reading, whether the courts have passed upon any particular portion of the act. Every effort has been made to state the law in as concise a manner as possible and to avoid such theorizing as might be legitimately indulged in the treatment of older and more complicated subjects. The aim has been to prepare a text book which will most nearly meet the wants of the profession—one that accurately, clearly and concisely states the law and practice, and renders their provisions readily accessible.

WILLIAM A. LUBY.

KALAMAZOO, MICH., *January 31, 1901.*

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The National Bankruptcy Law.¹

CHAPTER I.

DEFINITIONS.

SECTION 1. Meaning of Words and Phrases.—*a* The words and phrases used in this act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme

¹Art. I, §8 of the U. S. Const. authorizes Congress "to establish uniform laws on the subject of bankruptcies throughout the United States." This provision has been interpreted as vesting in Congress the power to enact laws whereby an insolvent's property may be distributed among his creditors and the insolvent discharged from his obligations (*In re Klein*, 1 How. [U. S.] 227). The laws must not only be uniform as to their operation (*In re Silverman*, 4 B. R. 523; *in re Reiman & Friedlander*, 11 B. R. 21; *Leidigh Carriage Co. v. Stengel* [C. C. A.], 1 N. B. News, 296, 387; s. c. 95 Fed. Rep. 637), but they must be established throughout the United States (*Sturgis v. Crownisheild*, 4 Wheat. [U. S.] 193). One which withholds from artificial persons privileges bestowed upon natural persons is not thereby characterized by a want of uniformity, the members of the corporation being individually at liberty to take full advantage of the law (*Leidigh Carriage Co. v. Stengel*, *supra*). To establish uniformity, bankruptcy acts must be liberally construed (*Norcross v. Nathan et al.* [D. C.], 99 Fed. Rep. 414).

When national bankruptcy laws are so established, they operate throughout the United States to the exclusion of state laws on that subject (*Sturgis v. Crownisheild*, *supra*; *Baldwin v. Hale*, 1 Wall. [U. S.], 222; *Parmenter Mfg. Co. v. Hamilton* [Mass.], 1 N. B. News, 8; s. c. 1 Am. B. R. 39; *in re Gutwillig* [D. C.], 90 Fed. Rep. 475; 92 Fed. Rep. 33; *in re Brush-Ritter Co.* [D. C.], 90 Fed. Rep. 651; *in re McMillan & Co.* [D. C.], 1 N. B. News, 41; *in re Bank of Waverly* [D. C.], 1 N. B. News, 41; *in re Sievers* [D. C.], 91 Fed. Rep. 366; *Lea Bros. et al. v. West Co.* [D. C.], 91 Fed. Rep. 237; *Victor v. Lewis* [N. Y.], 1 N. B. News, 104, 240; *in re Etheridge Furniture Co.* [D. C.], 92

Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) "court" shall mean the court

Fed. Rep. 329; *in re McKee* [D. C.], 1 N. B. News, 139; *in re Spencer* [D. C.], 1 N. B. News, 154; *in re Kletchka* [D. C.], 92 Fed. Rep. 901; *in re Curtis et al.* [C. C. A.], 91 Fed. Rep. 737; *in re Agins* [C. C.], 1 N. B. News, 133, 180; *Davis v. Bohle et al.* [C. C. A.], 1 N. B. News, 216; s. c. 92 Fed. Rep. 325; *in re Fellerath* [D. C.], 95 Fed. Rep. 121; *in re Houston* [D. C.], 94 Fed. Rep. 119; *in re Smith et al.* [D. C., Ind.], 92 Fed. Rep. 135; *in re Smith* [D. C., Ky.], 1 N. B. News 61; *in re Taylor* [D. C.], 95 Fed. Rep. 956). The reasoning can be traced to Art. 1, §10 of the Federal Constitution, which enjoins the States from passing laws that impair the obligation of contracts. It is safe to say, though there is a judicial leaning to the contrary (*Sturgis v. Crownshield*, *supra*; *Baldwin v. Hale*, *supra*; *Cook v. Moffat*, 5 How. [U. S.], 308; *Boyle v. Zacharie*, 6 Pet. [U. S.], 643; *Ogden v. Saunders*, 12 Wheat. 213; *Clay v. Smith*, 3 Pet. [U. S.], 411), that a State can at no time enact a valid bankrupt law, for to do so, the law must embrace two objects, the sequestration and distribution of one's property and the release of his debts (See Sto. Const. §1390). The second of these is an impairment of contracts, and a violation of the Federal Constitution, whether the contracts so impaired exist between citizens of the same or different states.

A Federal bankrupt law will not, *ipso facto*, supersede State laws that have for their object the collection of debts (*Chandler v. Siddle*, 10 B. R. 236; s. c., 3 Dill. [C. C.], 477). State laws relating to the insolvent estates of lunatics, spendthrifts, or deceased persons (*Hawkins v. Learned*, 54 N. H. 333; *Mayer v. Hillman*, 91 U. S., 262), State insolvent laws which merely protect the person from imprisonment (*Sullivan v. Haskell*, Crabbe [D. C.], 525; s. c., 4 Penn. L. J. 171), nor State laws regulating assignments for the benefit of creditors, which make no attempt to release unsatisfied obligations (*Cook v. Rogers*, 31 Mich., 391; s. c., 14 Am. L. Reg. 603; *in re Sievers* [D. C.], 1 N. B. News, 60; s. c. 91 Fed. Rep. 366; s. c. 1 Am. B. R. 117). If, however, the operation of these laws results in the creation of a preference, or works substantial injury to the creditors of an insolvent, the Federal law will be construed as paramount to or superseding the State laws, and the bankruptcy court will intercede to such an extent and with such process as will best protect the creditors (*in re Gutwillig*, *supra*; *Blake, Moffit & Towne v. Francis-Valentine Co.* [D. C.], 1 N. B. News, 47, 104; s. c. 89 Fed. Rep. 691; *in re Summers* [D. C.], 1 N. B. News, 60; *in re Smith*, *supra*; *in re Spencer*, *supra*; *in re Kletchka*, *supra*; *in re Pittlekow* [D. C.], 1 N. B. News, 234; s. c. 92 Fed. Rep. 901).

¹See notes to Section 4 b.

may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent¹ within the provisions of this act whenever the aggregate

¹Under the bankruptcy Act of 1867, one was "insolvent" if he were unable to pay his debts in the ordinary course of business. That he might be able to pay them at some future time, upon a settlement and winding up of his business, did not relieve him from the condition (*Sawyer v. Turpin*, 91 U. S. 114; s. c. 13 R. R. 71; *Wager v. Hall*, 16 Wall. [U. S.] 584; *Toof v. Martin*, 13 Wall. [U. S.] 40; s. c. 6 B. R. 49; *Hardy v. Clark*, 3 B. R. 385; *Hardy v. Binninger*, 7 Blatch. 262; s. c. 4 B. R. 262; *in re Williams*, 1 Lowell, 406; s. c. 3 B. R. 286. See also for comparison *in re Woods*, 7 B. R. 126; *in re Oregon Pig Co.*, 13 B. R. 503; *in re Randall & Sutherland*, 3 B. R. 18; s. c. Deady. 557; *in re Wells*, 3 B. R.).

The "ordinary course of business" above referred to does not mean an inability to turn out goods, or bills receivable, or assets or securities to pay one particular debt, leaving other debts which are certain to become due unprovided for, but the ability to pay one debt as it becomes due, or as usually paid by traders, without jeopardizing others that may fall due (*Driggs v. Morse*, 3 B. R. 602; s. c. 1 Abb. C. C. 440; *in re Dibble et al.*, 2 B. R. 617; s. c. 3 Benn. [D. C.] 283. See also *Curran v. Munger*, 4 B. R. 295; s. c. 6 B. R. 33; *Miller v. Keyes*, 3 B. R. 224; *Farran v. Crawford*, 2 B. R. 602; *in re Or. Pig. Co.*, 13 B. R. 503; s. c. 3 Cent. Low J. 515; *in re Ryan*, 2 Sawy. [C. C.] 411; *in re Craft*, 1 B. R. 378; s. c. 6 Blatchf. [C. C.] 177).

of his property, exclusive of any property which he may have conveyed, transferred, concealed,¹ or removed, or permitted to be concealed or removed, with intent to defraud,² hinder or delay his creditors, shall not, at a fair valuation,³ be sufficient in amount to pay his debts;⁴ (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath"⁵ shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall

¹See notes to §3.

²See notes to §3.

³What a fair valuation may be is a question of fact. It is not a fancy price, nor is it such a price as might be realized on a forced sale, because at such a sale, goods are ordinarily sold at a sacrifice price. It is such a price as persons dealing in the particular line would place on the goods in view of their condition and cost in the open market—such as a good careful business man would inventory the goods at in the ordinary course of business (see *in re Martin* [D. C.], 1 N. B. News, 301). When a question of insolvency arises under this subdivision, all the property which the bankrupt owns is to be reckoned in computing the amount of his assets, except such as may have been transferred or concealed in fraud of his creditors, but not excluding property which is exempt from execution by the laws of the state (*in re Baumann* [D. C.], 96 Fed. Rep. 946). If, so computing it, the testimony shows assets that cost over \$30,000, say, while the liabilities aggregate less than \$16,000, insolvency does not exist (*in re Rogers' Milling Co.* [D. C.], 102 Fed. Rep. 687).

⁴Under the U. S. Revenue Law, the word "debt" was defined as follows:

"Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds: *solvendum in praesenti* and *solvendum in futuro*. Whether a claim or demand is a debt or not is in no respect determined by a reference to the time of payment. A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened" (*People v. Arguello*, 37 Cal. 525). While this language was used in the construction of a statute foreign to bankruptcy, yet it applies in all its particulars to the bankrupt Act of 1867 for that act declares "that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day * * * may be proved against the estate of a bankrupt" (§19, Act 1867. See also Rev. Stat. §5067 [Act 1841, §5]). The time of the adjudication was the time the petition was filed (*in re Patterson*, 1 B. R. 125; *Bailey v. Loeb*, 11 B. R. 271; 2 Cent. L. J. 42. See also §63 and notes as to debts which may be proved).

⁵See notes to §14 b.

include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition"¹ shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead; (22) "conceal"² shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally as a payment, pledge, mortgage, gift or security; (26) "trustee"³ shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

¹See notes to §59.

²See notes to §3.

³See §§2, 42, 43 and 44 as to appointment of trustees.

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

SEC. 2. That the courts of bankruptcy¹ as hereinbefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings,² in vacation in chambers

¹Bankruptcy Courts are statutory in origin. Such courts differ from common law courts in the extent and exercise of their jurisdiction. They have no powers, authority or jurisdiction except as expressly conferred upon them by statute, or such as may be necessary to enable the court, efficiently, to carry the law into effect (*Clark v. Binninger*, 38 How. Pr. 341; s. c. 3 B. R. 518; *in re Norris*, 4 B. R. 35; *Jobbins v. Montague*, 6 B. R. 509; *Russell v. Cheatham*, 16 Miss. 703). Yet, they are not inferior courts in the sense that the face of the record must show jurisdiction to give validity to their acts (*Hayes v. Ford*, 15 B. R. 569; *Buckman v. Cowell*, 1 N. Y. 505; *Bank v. Judson*, 8 N. Y. 254; *Reed v. Vaughan*, 10 Mo. 447).

²The Act of 1867 (§1) provided that jurisdiction might be exercised "in their respective districts." In the present act, the language is "within their respective territorial limits." In *Lathrop v. Drake*, 91 U. S. 516; s. c. 13 B. R. 472, the Supreme Court held that the territorial jurisdiction conferred by the former act was such that the courts of districts other than that in which the bankrupt proceedings were pending, might exercise jurisdiction in matters growing out of or connected with any particular bankrupt proceeding pending in another district so far as the jurisdiction so exercised did not conflict with that of the court in which the proceedings were pending. See also *Shearman v. Bingham*, 7 B. R. 490; s. c. 3 Cliff. 552; *Goodall v. Tuttle*, 7 B. R. 193; *Payson v. Diets*, 8 B. R. 193. The jurisdiction thus referred to enabled the court which acquired jurisdiction over the bankrupt by the filing of a petition to adjudicate all questions relating to the property of the bankrupt, of whatever character, within its district and all questions excepting the reduction to possession of property without that district. The title to the property, wherever situated, having vested in the legal representative of the bankrupt, the decrees of the court in which the petition was filed would affect the claims of all creditors, whether residing within or without the district, however they might have been brought into the proceeding, or whether they appeared at all (*Markson v. Heaney*, 1 Dill. 497; s. c. 4 B. R. 510; *Paine v. Caldwell*, 6 B. R. 558; *Piquet v. Swan*, 5 Mason, 35; *Toland v. Sprague*, 12 Pet. 327; *Herndon v.*

and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions,' (2) allow

Ridgeway, 17 How. 424; *in re Hirsch*, 2 B. R. 3; s. c. 2 Ben. 493; *Jobbins v. Montague*, 6 B. R. 309). Under the present act, the property of the bankrupt without the jurisdiction of the district in which the petition is filed, may be reduced to the possession of the Trustee through such courts as the bankrupt might have proceeded before bankrupt proceedings had been commenced (See §23). See also Rule IV as to the right of interested persons to appear personally or by attorney; §69 relating to possession of property; and §70 as to the title of property, together with the notes to these sections.

The powers conferred by this section vest the bankruptcy courts with full jurisdiction of actions at law and suits in equity to collect the estates of bankrupts, and this jurisdiction is not impaired in any respect by the provisions of §23 *b* (*in re Woodbury et al.* [D. C.], 98 Fed. Rep. 833; *in re Mayer* [D. C.], 98 Fed. Rep. 839; *in re Scott et al.* [D. C.], 99 Fed. Rep. 404; *Wall et al. v. Cox C. C. A.*], 101 Fed. Rep. 403. See also §23 *b* and notes thereto).

¹The Act of 1867 provided that persons who "had resided or carried on business for six months next preceding the time of filing such petition, or for the longest period during such six months." Where the place of residence conflicted with that of domicile, questions arose in which it was held that the bankrupt proceedings should be commenced with reference to the place of residence, and not with reference to the domicile (*In re Watson*, 4 B. R. 613; *Stiles v. Lay*, 9 Ala. 795; *in re Kinssman*, 1 N. Y. Leg. Obs. 307). Since the present act provides that the proceedings may be commenced with reference to the domicile as well as the residence, these decisions are of importance only in so far as they show the strict interpretations placed on each word in the act.

Where a corporation, organized under the laws of one state in which it did its manufacturing, has an executive office in another state, the latter may be regarded as its domicile, especially when its manufacturing works has been shut down in the former state some months before the filing of the petition (*in re Machine & Conveyer Co.* [D. C.], 1 N. B. News, 135; s. c. 91 Fed. Rep. 630). So, the place of business of a firm is its domicile (*in re Blair et al.* [D. C.], 99 Fed. Rep. 76). "Domicile" is analogous to "residence;" it means "that residence from which there is no present intention to remove, or to which there is a general intention to return" after one has been absent from it and taken up an abode and engaged in business in other places (*In re Williams* [D. C.], 99 Fed. Rep. 544). Whenever residence is put in issue, the petitioner has the burden of establishing it as being in the district alleged in the petition (*In re Waxelbaum* [D. C.], 97 Fed. Rep. 562). The issue may be raised, before adjudication, on a motion to dismiss the

claims;¹ disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;² (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;³ (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations for violations of this act,⁴ in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates; (6) bring in and substitute additional persons

petition for want of jurisdiction (*in re Waxelbaum* [D. C.], 98 Fed. Rep. 589). See also Forms 1 and 3 for allegation of residence in petitions; also Rule VI as to petitions in different districts, and Rule VII as to priority of petitions when two or more are filed against a common debtor.

¹For proof and allowance of claims, see §57; for provable debts, §63, and notes to these sections.

²"Bankrupt estate" undoubtedly has the same meaning as "estate of a bankrupt." This latter expression means such property and rights of property of the bankrupt as the bankrupt act vests in the assignee (*In re Hambright*, 2 B. R. 498).

See §70 as to what and when the title to property vests in the trustee, together with the notes under that section. See §29 *b* as to punishment for concealing or appropriating property belonging to the bankrupt's estate.

³The power here vested in the court to appoint receivers or marshals was inserted in the bill after the report of the Conference Committees of the House and Senate, thereby showing that the intention of Congress was to leave the title of property in the bankrupt until adjudication. See §69, as to possession of property and §70 as to title of property. The bankruptcy court may enjoin a disposal of the property in order to preserve the estate until a trustee can be appointed (*Rumsey & Skinner Co. et al. v. Novelty & Machine Co. et al.* [D. C.], 99 Fed. Rep. 699).

See §1 (26) for definition of trustee; §23 *b* as to suits by trustees; §§44 and 45, relative to their appointment; §50 *b* as to what constitutes their qualification; §46 as to death or removal; §47 as to duties; §48 as to compensation; and §49 as to inspection of papers and accounts in their possession.

⁴See §19 relative to the right of trial by jury; §29 as to offenses generally, and §41 as to contempts before Referees.

or parties¹ in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies² in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts³ and discharging the trustees,⁴ and reopen them whenever it

¹The *bankrupt*, the *trustee* and all his *creditors* wherever they reside or whether they have been individually served with notice are considered "parties." They are subject to the jurisdiction of the court, and are bound by its proceedings unless exempted by a special provision of law (*Marsh v. Armstrong*, 20 Minn. 81; s. c. 11 B. R. 125; *Crocker v. Crocker* [C. C.], 98 Fed. Rep. 706), though testamentary trustees may also be made parties (*in re Boudouine* [D. C.], 96 Fed. Rep. 538). Unless they voluntarily appear or are brought in by the service of process, all persons other than the bankrupt, his creditors and the trustees are strangers to the proceeding, and an order of the court cannot affect their rights (*Marshall v. Knox*, 16 Wall. 551; s. c. 8 B. R. 97). Nor can strangers to the bankrupt proceedings be summarily brought into court by the filing of a petition for that purpose (*Marshall v. Knox*, 16 Wall. 551; s. c. 8 B. R. 97; *Smith v. Mason*, 14 Wall. 419; s. c. 6 B. R. 1; *in re Buntrock Clothing Co.* 1 N. B. News, 228; s. c. 92 Fed. Rep. 886). They are entitled to an adjudication of their rights within the jurisdiction where the bankrupt, before the filing of the petition, might have brought or prosecuted the proceedings (See §23). The court of bankruptcy has power to hear and determine all questions pertaining to the estate of the bankrupt, and if strangers voluntarily appear the court thereby acquires jurisdiction of the subject matter and of the persons (*Samson v. Blake*, 9 Blatch. 379; s. c. 6 B. R. 410). After the court once acquires jurisdiction of the person of a stranger, he cannot thereafter withdraw his appearance or except to the court's jurisdiction (*In re Ulrich*, 3 B. R. 133; s. c. 3 Ben. 355; *in re Worthington*, 14 B. R. 388; *People v. Brennan*, 12 B. R. 567; s. c. 3 Hun. 666; *in re Ferguson & Peckham*, 6 B. R. 569; *O'Brien v. Weld*, 92 U. S. 81; s. c. 15 B. R. 405). Whether parties having claims adverse to the trustee can have them adjusted without the trustee's consent, in a summary proceeding, seems to be an open question, there being authority favoring such an adjustment (*In re Evans*, 1 Lowell, 525), and opposed to it (*Hurst v. Teft*, 12 Blatch. 217; s. c. 13 B. R. 108; *Bradley v. Healey*, 1 Holmes, 451; *Wood v. Brooke*, 9 B. R. 395). See also §70 and notes as to the title to property. All objections to so adjusting such differences, however, will be considered waived unless raised when appearance is first entered (*In re Ulrich*, 3 B. R. 133; s. c. 3 Ben. 355). Under the Act of 1867, the objection to a summary adjustment of such differences related to the jurisdiction of the court over the person rather than the subject-matter (*In re Bonesteel*, 3 B. R. 517; *in re Ballou*, 3 B. R. 717; s. c. 4 Ben. 135); but under the present act, it relates to both (§23 b).

²For marshaling assets, see §47, for arbitration of controversies, see §26, for compromises, §27; and as to the jurisdiction of courts in suits by trustees, §23 b and notes thereto.

³The trustee must keep regular accounts, and make final report and account fifteen days before the final meeting of creditors (§47). These accounts and all papers in his hands as trustee are open to inspection (§49).

⁴As to death or removal of trustee and effect thereof on pending suits, see §46 and notes.

appears they were closed before being fully administered;¹ (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases;² (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees;³ (11) determine all claims of bankrupts to their exemptions;⁴ (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases;⁵ (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;⁶ (14) extradite bankrupts from their respective districts to other districts;⁷ (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act;⁸ (16) punish persons for contempts committed before referees;⁹ (17) pursuant to the recommendations of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and

¹The administration of an estate consists of the trustee performing his duties in regard thereto. (See §47.)

²As to confirmation of compositions, see §12, and as to setting them aside, §13.

³As to keeping and transmitting records, see §§39 (7) and 42. The orders and decrees of a court of bankruptcy may be made and corrected at any time, there being no regular sessions, and the court being always open (*Mahoney et al. v. Ward* [D. C.] 100 Fed. Rep. 278).

⁴As to exemptions of bankrupts, see §6.

⁵As to discharge of bankrupts, see §14; revoking discharge, §15; and as to debts not affected by, §17.

⁶For offenses, generally, see §29. Under this delegation of power, the bankruptcy court may require the bankrupt to surrender to the trustee property which the evidence clearly shows to be in his possession or under his control (*In re McCormick* [D. C.], 97 Fed. Rep. 566; *in re Schlesinger*, Id., 930; *in re Duell*, 100 Id., 633; *in re Tudor*, Id., 796; *in re Rosser* [C. C. A.], 101 Id., 562; *Ripon Knitting Works v. Schreiber*, [D. C.], Id., 810; *in re Schlesinger* [C. C. A.], 102, Id., 117).

⁷For extradition of bankrupts, see §10.

⁸As to Rules, Forms and Orders, see §30. Under this subdivision, the court has authority to make an order in the nature of a writ of *Ne Exeat* when the arrest of the bankrupt is shown to be necessary for the enforcement of the bankruptcy law (*In re Lipke et al.* [D. C.], 98 Fed. Rep. 970).

⁹As to what constitutes contempts before referees, see §41. See also §21, as to evidence.

upon complaints of creditors, remove trustees for cause upon hearings and after notices to them;¹ (18) tax costs,² whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and (19) transfer cases to other courts of bankruptcy.³

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

¹As to appointment of trustees by creditors or the court, see §44; relating to meetings of creditors at which appointments may be made, and who entitled to vote at, see §56.

²As to costs in contested cases, see Rule XXXIV. The costs or expenses of storing personal property sustained by a creditor while holding the property under a lien, may, if the lien be dissolved by an adjudication in bankruptcy, prove the amount thereof as a claim against the estate, though such claim is not taxable as costs, and is not entitled to priority (*In re Allen*, [D. C.], 96 Fed. Rep. 512). The same is true when an intervening creditor is unsuccessful and property levied on is surrendered and sold, the costs of caring for it in the interim will not be taxed against the creditor, though all witness fees may be so taxed, except extra compensation to experts, which will not be allowed though the parties stipulated to that effect (*In re Carolina Cooperage Co.* [D. C.], 96 Fed. Rep. 604).

³When petitions shall be filed against the same person in different courts of bankruptcy having jurisdiction, the cases may be consolidated by a transfer. See §32.

CHAPTER III.

BANKRUPTS.

SEC. 3. **Acts of Bankruptcy.**¹—a Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred,² concealed,³ or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them;⁴ or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer

¹Under similar provisions of former bankrupt acts, the courts have been divided as to the liberality with which the same should be construed, some holding that the statute should be interpreted to include only such cases as clearly come within its scope (*Wilson v. City Bank*, 17 Wall. 473; s. c. 9 B. R. 97; *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131); and others that the construction should be so liberal as to effect the objects of the act and promote justice (*In re Silverman*, 4 B. R. 523, s. c. 2 Abb. C. C. 243; *in re Lock*, 2 B. R. 123; s. c. 1 Lowell, 293; *in re Muller & Bretano*, 3 B. R. 329).

²For definition as used in this act, see §1 (25).

The payment of money by a debtor on a valid pre-existing debt under circumstances which do not make it technically a preference, is not a "transfer of property" in such sense that the same may be recovered for the benefit of the estate within the meaning of §67 c (*Blakey v. Coonville Nat. Bank* [D. C.], 95 Fed. Rep. 267).

³For definition, see §1 (22). If one procures or suffers a fictitious attachment to be made on his property for the purpose of misleading a creditor as to the extent of the owner's interest, he will, in the eyes of the bankrupt court, have concealed such property (*In re Williams*, 3 B. R. 286; s. c. 1 Lowell 406; *O'Neill v. Glover*, 5 Gray 144; *in re Hussman*, 2 B. R. 437). Yet, it has been held that a concealment to be within the meaning of the bankrupt law must be actual, not constructive (*Silverman v. Bagley*, 3 Mass. 487).

⁴The intent to hinder, delay, or defraud is a question of fact and must be established by evidence (*In re Cowles*, 1 B. R. 280; *in re Goldschmidt*, 3 B. R. 165; s. c. 3 Ben. 379; *Eckfort v. Greely*, 6 B. R. 433; *Perry v. Langley*, 2 B. R. 596; s. c. 8 A. L. Reg. 427; *in re Hirsch*, [D. C.], 96 Fed. Rep. 468; *in re Rome Planing Mill* [D. C.], 96 Fed. Rep. 812), direct or circumstantial (*Van Wyck v. Seward*, 18 Wend. 374; *Newman v. Cordell*, 43 Barb. 456). A corporation is not guilty of an act of bankruptcy under this subdivision in allowing a receiver to be appointed in a State court which results in a conveyance to him of the corporate property (*In re Baker-Ricketson Co.* [D. C.], 97 Fed. Rep. 489), and it is a question whether it is so guilty in voluntarily applying for a receiver and for a decree dissolving it (*In re Harper Bros.* [D. C.], 100 Fed. Rep. 266).

Where an insolvent corporation sells property and pays creditors with the proceeds, a petition filed more than four months after such payments is too late where the payments are alleged as the acts of bankruptcy, though within four months

such creditors over his other creditors;¹ or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least

after the recording of the deed (*In re Mingo Val. Creamery Ass'n* [D. C.], 100 Fed. Rep. 282). If an insolvent transfer his entire stock to another in consideration or part consideration of an agreement on the part of the one receiving it to pay and discharge a certain debt due at a bank for money advanced, the intent referred to in this subdivision will be presumed, and the act will be one of bankruptcy (*Goldman, Beckman & Co. v. Smith*, [D. C.], 1 N. B. News, 160; s. c. 93 Fed. Rep. 182).

¹For definition of "transfer," see § 1 (25). As to preferences, see § 60.

The transfer of property by an insane insolvent will not amount to an act of bankruptcy since he is not responsible for his acts, and a petition cannot be filed against such insolvent because of such transfer against the objection of the insolvent's guardian (*In re Funk* [D. C.], 101 Fed. Rep. 244).

An unexecuted agreement to make a transfer is not an act of bankruptcy (*Winter v. R. R. Co.*, 2 Dill. 487; s. c. 7 B. R. 289), nor is a conveyance sought to be made by a void instrument (*In re Dunham & Orr*, 2 Ben. 488; s. c. 2 B. R. 17). The act of bankruptcy under this subdivision includes three ingredients,—The transfer, insolvency, and intent to prefer—all questions of fact. The intent to prefer must be proved just as the intent to defraud, in the preceding subdivision, (*Morgan & Co. v. Mastick*, 2 B. R. 521; *Miller v. Keys*, 3 B. R. 224; *Doan v. Compton*, 2 B. R. 607; *Perry v. Langley*, 2 B. R. 596; s. c. 8 A. L. Reg. 427); but it may be inferred from the circumstances of the transfer, the acts of the bankrupt, and the natural consequences thereof (*Morse v. Godfrey*, 3 Sto. 391; *Trader's Bank v. Campbell*, 14 Wall. 87; s. c. 6 B. R. 353; s. c. 3 B. R. 498; *Sampson v. Burton*, 5 Ben. 325; s. c. 4 B. R. 1; *Terry v. Cleaver*, 2 Bliss. 356; s. c. 4 B. R. 126; *in re Dibblee*, 3 Ben. 354; s. c. 2 B. R. 617; *in re Drummond*, 1 B. R. 231; *Curran v. Munger*, 6 B. R. 33),—from any facts that will justify the inference (*Linkman v. Wilcox*, 1 Dill. 161; *Beattie v. Gardner*, 4 B. R. 323; s. c. 4 Ben. 479; *Giddings v. Dodd*, 4 B. R. 657; s. c. 1 Dill. 115; *in re Rome Planing Mill* [D. C.], 96 Fed. Rep. 812), the last case confining the question of intent to the bankrupt alone, that of the person receiving the preference not being material. If the preference must naturally follow the act, the law presumes the intention to exist and will not, ordinarily, permit such presumption to be rebutted by evidence of a want of intention (*In re Smith*, 4 Ben. 1; 3 B. R. 377; *Miller v. Keys*, 3 B. R. 224; *in re Gay*, 2 B. R. 358; *Hardy v. Clark*, 3 B. R. 385; *Hardy v. Binninger*, 7 Blatch 262; s. c. 4 B. R. 262; *Sawyer v. Turpin*, 5 B. R. 339; s. c. 1 Holmes, 251; 91 U. S. 114; s. c. 13 B. R. 271; *Webb v. Sachs*, 15 B. R. 168; *in re Black & Secor*, 1 B. R. 353; *in re Silverman*, 4 B. R. 523). An almost conclusive presumption of an intent to prefer is raised when one knowing himself to be insolvent makes payments in excess of the *pro rata* share of the payee (*Toof v. Martin*, 4 B. R. 488; s. c. 1. Dill. 203; *in re Oregon Prtg. Co.*, 13 B. R. 503; *in re Smith*, 3 B. R. 377; *in re Batchelder*, 3 B. R. 150; *in re Silverman*, 4 B. R. 523; *Driggs v. Moore*, 3 B. R. 602; s. c. 1 Abb. C. C. 440; *Farren v. Crawford*, 2 B. R. 602; *Rison v. Knapp*, 1 Dill. 187; s. c. 4 B. R. 349), and especially when the transfer is of all one's property (*In re Waite*, 1 Lowell, 407; *Johnson v. Wald* [C. C.], 1 N. B. News, 325; s. c. 93 Fed. Rep. 640; *Goldman, Beckman & Co. v. Smith*, 1 N. B. News, 160; s. c. 93 Fed. Rep. 182). The presumption raised as above stated, of an intention to prefer, may be rebutted by the debtor showing that at the time he made the preferential payments, he believed himself to be solvent, and that his affairs were in such condition that he could reasonably expect to pay all his debts (*Toof v. Martin*, 13 Wall. 40; s. c. 6 B. R. 49). The testimony of a party himself, however, on the question of intention, is

five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference;¹ or (4) made a general assignment for the

entitled to but very little credence (*Oxford Iron Co. v. Slafter*, 13 Blatch. 455; s. c. 14 B. R. 380), since his conduct affords stronger proof of his intention than his words (*Trader's Bank v. Campbell*, 14 Wall. 87; s. c. 6 B. R. 353). Nor is the intent negated by the fact that no other debts are due at the time the preferential payment is made (*Warren v. Bank*, 10 Blatch. 493; s. c. 7 B. R. 481), though there must be other provable claims (*Beers v. Hanlin* [D. C.], 99 Fed. Rep. 695). The fact that the preferential transfer or payment was made in fulfillment of a prior promise made when the debt was contracted will not negative the intent (*Arnold v. Maynard*, 2 Story, 349), for the obligation is no greater than if the prior promise to transfer or give security had not been made (*Forbes v. Howe*, 102 Mass. 427; *Sawyer v. Turpin*, 91 U. S. 114; s. c. 13 B. R. 271; *Nat. Bank v. Hunt*, 11 Wall. 391; s. c. 4 B. R. 616). Yet, a distinction has been drawn where the agreement to give security on, or transfer, certain specific property was made at the time the obligation arose. A conveyance in fulfillment of such a promise within a reasonable time was held not to be a preference (*Galtman v. Honea*, 12 B. R. 493. See also *re Jackson Iron Co.*, 15 B. R. 438), the general rule being that the preference can only arise when the transfer or payment is applied to antecedent debts (*Burnhisel v. Firman*, 22 Wall. 170; s. c. 11 B. R. 505; *Clark v. Iselin*, 21 Wall. 360; s. c. 11 B. R. 337; *Tiffany v. Boatman's Sav. Inst.*, 18 Wall. 376; *Cook v. Tulliss*, 18 Wall. 332; s. c. 9 B. R. 433; *Sawyer v. Turpin*, 91 U. S. 114; s. c. 13 B. R. 271. See also §60, 67 d). No transfer or payment is a preference within the meaning of the statute, if the creditor has not been injured by it (*Winter v. R. R. Co.*, 2 Dill. 487; s. c. 7 B. R. 289; *Livingston v. Bruce*, 1 Blatch. 318; *Coxe v. Hale*, 10 Blatch. 56; s. c. 8 B. R. 562; *Catlin v. Hoffman*, 9 B. R. 342; *Winslow v. Clark*, 47 N. Y. 261; *Windsor v. Kendall*, 3 Story, 507; *Rix v. Bank*, 2 Dill. 367; *Schlitz v. Schantz*, 2 Biss. 248; *Rumsey & Sikemier Co. et al. v. Novolty & Machine Mfg. Co.* [D. C.], 99 Fed. Rep. 699). The intent is to be drawn from the whole transaction (*Sparhawk v. Richards*, 12 B. R. 74; *Galtman v. Honea*, 12 B. R. 493; *in re McKay*, 7 B. R. 230; *in re Perrin*, 7 B. R. 283). A preferential transfer made under coercion is an act of bankruptcy (*Arnold v. Maynard*, 2 Story, 349; *Clarion Bank v. Jones*, 21 Wall. 325; s. c. 11 B. R. 381; *Sawyer v. Turpin*, 91 U. S. 114; s. c. 13 B. R. 271; *Giddings v. Dodd*, 1 Dill. 115; s. c. 4 B. R. 657; *Strain v. Gourdin*, 2 Woods, 380; s. c. 11 B. R. 156). So also is one made in payment of a claim which cannot be proved in bankruptcy (*In re Dibble*, 2 B. R. 617; s. c. 3 Ben 354). A principal is charged with an agent's intention to make a preferential transfer or payment (*Beattie v. Gardner*, 4 B. R. 323; *Graham v. Stark*, 3 B. R. 357).

¹See §60a as to when one is deemed to have given a preference. In connection with the same subject, the act of 1841 used the word "procured", and that of 1867, "permit or suffer" instead of "suffered or permitted" as in the present act. The language of the act of 1841, "procured," is employed in §60 of this act, so that for all purposes of construction, the language of this subdivision may be considered "procured, suffered or permitted." The act of 1867 expressly provided that the debtor "should permit or suffer his property to be taken on legal process with intent to give a preference." Under that statute, the District Courts ignored the question of intent and held that the debtor was guilty of an act of bankruptcy if he failed to file a voluntary petition in bankruptcy when his property became jeopardized by the action of creditors (*In re Gallinger*, 1 Saw. 224; s. c. 4 B. R. 729; *in re Black & Secor*, 1 B. R. 353; *in re Craft*, 1 B. R. 378; *in re Sutherland*, 1 B. R. 531; *in re Dibblee*, 2 B. R. 617; *in re Schick*, 1 B. R. 177; *in re Haughton*, 1 B. R. 460; *Buchanan v. Smith*, 4 B. R. 397). These cases were over-ruled by

benefit of his creditors;¹ or (5) admitted in writing his

the U. S. Supreme Court which held that one was not obliged to defend an action to which he had no meritorious defense, and his failure so to do did not amount to an act of bankruptcy because it was lacking in the essential element of intent to prefer or suffer a preference (*Wilson v. Bank of St. Paul*, 17 Wall, 473; s. c. 9 B. R. 97). Since the present statute omits the element of intent, the District decisions stand as upon a precisely similar statute, while the Supreme Court decision rests upon an entirely different one and cannot be regarded as a precedent. A preference while insolvent is an act of bankruptcy, and it is of no consequence from what cause or in what manner it arose. The law presumes that it is within the power of the insolvent to prevent it by contesting proceedings leading to it, or going into voluntary bankruptcy when the preference cannot otherwise be prevented (*In re Arnold* [D. C.], 1 N. B. News, 334; s. c. 94 Fed. Rep. 1001; *in re Whalen* [D. C.], 1 N. B. News, 228). This presumption is so strong that it even attaches to one against whose property a judgment levy is made without collusion and without the insolvent's knowledge (*In re Moyer* [D. C.], 1 N. B. News, 260; s. c. 93 Fed. Rep. 188; *in re Reichman* [D. C.], 91 Fed. Rep. 624; *in re Cliffe* [D. C.], 94 Fed. Rep. 352). It is not a preference to sell a leasehold interest not assignable and apply the proceeds to rent, taxes and expenses of sale (*In re Pearson* [D. C.], 95 Fed. Rep. 425). Nor is it an act of bankruptcy to suffer a preference where a lien upon which it is predicated was obtained more than four months before the filing of the petition in bankruptcy (*In re Ferguson* [D. C.], 95 Fed. Rep. 429). The question of preference is one of fact, the burden of proving which rests on the petitioning creditors (*In re Rome Planing Mill* [D. C.], 96 Fed. Rep. 812). The proving of the preference, under this subdivision, is in fact nothing more than establishing insolvency and showing the transfer, intent being immaterial. The act of bankruptcy rests in the mere failure of the bankrupt, while insolvent, to vacate or discharge the execution on which the property was seized at least five days before the sale (*In re Planing Mill supra*; *Parmenter Mfg. Co. v. Stover et al.* [C. C. A.], 97 Fed. Rep. 330). The subdivision does not apply to liens not affected by the act (*In re Chapman* [D. C.], 99 Fed. Rep. 395; *in re Nelson* [D. C.], 98 Fed. Rep. 76).

The four months within which the petition may be filed runs from the date the bankrupt should have vacated the execution (*Parmenter Mfg. Co. v. Stover, supra*), the day on which the failure took place to be excluded and that on which the petition is filed to be included (*In re Dupree* [D. C.], 97 Fed. Rep. 28).

¹The former act of bankruptcy contained no provision on the subject of this subdivision. The question as to whether an assignment was an act of bankruptcy, was open, the decisions being *pro* and *con*. The old decisions on the subject are now inapplicable, in view of the positive enactment here contained. A general assignment for the benefit of creditors, though valid until a subsequent adjudication in bankruptcy (*in re Romanow* [D. C.], 92 Fed. Rep. 510), is in itself an act of bankruptcy, though made without preferences, without actually intending to defraud creditors, and without the existence of insolvency (*in re Meyer* [C. C. A.], 98 Fed. Rep. 976; *Clark v. Am. Mfg. & Enameling Co.* [C. C. A.], 101 Fed. Rep. 962). In view of this, an averment of insolvency, when the petition in bankruptcy is founded on an assignment for the benefit of creditors, raises an immaterial issue (*West Co. v. Lea* [U. S. Supreme Ct.], 174 U. S. 590; s. c. 19 Sup. Ct. Rep. 836), on which the defendant is not entitled to a jury trial (*Simonson v. Sincheimer et al.* [C. C. A.], 100 Fed. Rep. 426). A corporation's voluntary application in a State court for dissolution and appointment of a receiver is not an assignment within the meaning of this subdivision, even if the receiver be appointed (*in re Empire Metallic Bedstead Co.* [C. C. A.], 98 Fed. Rep. 981). Such a proceeding, the same case holds, may produce results equivalent to those brought about by a

inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.¹

b A petition may be filed against a person who is insolvent² and who has committed an act of bankruptcy within four months³ after the commission of such

general common law assignment, but the acts of bankruptcy enumerated will not be enlarged by construction to include similar but not identical transactions. The same is true when the proceedings in the State court are not voluntary. They operate only on property within the state, and must give way to creditors pursuing their remedies in other states (*Huntington v. Chesapeake, O. & S. W. Ry. Co.* [C. C.], 98 Fed. Rep. 458). A similar case has arisen in regard to a copartnership. Where two of the members filed an application in a state court for the appointment of a receiver, the other partner not objecting, the act was held to be one of bankruptcy on the theory that it was in effect a general assignment (*Mather v. Coe* [D. C.], 92 Fed. Rep. 333). This case does not differ from either of the two last cited and must be regarded as overruled by them. See §5 and notes as to partners. The question of insolvency not being involved in proceedings under this subdivision, the defense of solvency cannot be made (*Lea Bros. & Co. et al. v. West Co.* [D. C.], 1 N. B. News, 79; s. c. 91 Fed. Rep. 237; *Bray v. Cobb* [D. C.], 1 N. B. News, 209; s. c. 91 Fed. Rep. 102; *West Co. v. Lea Bros.* [U. S. Supreme Ct.], 1 N. B. News, 298; s. c. 19 Sup. Ct. Rep. 836; *Chemical Nat. Bank v. Meyer* [D. C.], 1 N. B. News, 304; s. c. 92 Fed. Rep. 896; *in re Empire Metallic Bedstead Co.* [D. C.], 1 N. B. News, 386; s. c. 95 Fed. Rep. 957; *Leidigh Carriage Co. v. Stengel* [C. C. A.], 1 N. B. News, 296, 387; s. c. 95 Fed. Rep. 637).

¹It is not an act of bankruptcy, within the meaning of this subdivision, for a corporation to authorize one of its officers by a unanimous vote of its stockholders to appear in court on behalf of the corporation, in the event of an involuntary petition in bankruptcy being filed against it, and make admission of insolvency. The act contemplates a more unqualified admission. Nor can the officer so instructed make a written admission after the petition is filed so as to authorize an adjudication (*in re Baker-Ricketson Co.* [D. C.], 97 Fed. Rep. 489). The admission of inability to pay debts and willingness to be adjudged a bankrupt on that ground is within the authority of the directors of the corporation, and is not a corporate function to be exercised by the stockholders generally (*in re Rollins Gold & Silver Min. Co.* [D. C.], 102 Fed. Rep. 982). A petition based on such an admission will not be construed as in effect voluntary so as to allow corporations otherwise excluded the benefit of voluntary bankruptcy (*in re Kelly Dry Goods Co.* [D. C.], 102 Fed. Rep. 747).

²The person must be actually insolvent within the meaning of this act. It is not enough that his business is such that he will soon become insolvent (*Beals v. Quinn*, 101 Mass. 262).

As to the effect and treatment of two or more petitions filed against the same individual in different districts, see Rule VI, and as to priority of petitions filed against a common debtor, alleging separate acts of bankruptcy, see Rule VII. See also §59 as to who may file and dismiss petitions; §18 as to courts and procedure therein, and Rule XXX as to imprisoned debtors.

³The four months within which the petition may be filed are computed by excluding the day on which the alleged act of bankruptcy was committed and including that on which the petition is filed. For instance, for an act of bankruptcy committed on Oct. 20, 1898, a petition filed on Feb. 20, 1899 was within the time. This applies to the duplicates required in §7a (8) as well as the original, it

act.¹ Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors, or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one

being fatal if either be not filed within the time. (See *in re Stevenson* [D. C.], 1 N. B. News, 313; s. c. 94 Fed. Rep. 110, and cases under former bankruptcy acts there cited.)

¹This is a provision whereby one's property may be taken from him and distributed among his creditors. A bankrupt law is one whereby (1) creditors are satisfied so far as possible out of the debtor's property, and (2) the debtor entirely discharged of his obligations. Without entering upon a discussion, this is the meaning attached to this word before and at the time of the adoption of the United States Constitution (13 Eliz., c. 7; 4 Anne, c. 17; 10 Anne, c. 15; 53 Geo. III, c. 102), and since (6 Geo. IV, c. 16; 2 Will. IV, c. 56; 1 and 2 Vict., c. 110). A bankrupt has no absolute right to a discharge under the present act, for the discharge rests on so many contingencies that it is practically discretionary (§14). We have, therefore, under this section, provisions for stripping one of his property, distributing it among his creditors, and leaving him without a discharge. Such a statute embodies only one of the two elements of a bankrupt law. A bankrupt law is one which has for its object the relief of the debtor. The involuntary feature of this act is designed for the benefit of the creditor rather than for the debtor. It seems to be an *insolvent's* or *fraudulent debtor's* act with which the States rather than the Federal government have to do (Am. to U. S. Const., Art. X.), and inharmonious with Art. 1, §8 of the U. S. Constitution which authorizes Congress to enact laws on the subject of "bankruptcies." It is very questionable whether, under our constitution, Congress can enact a valid involuntary bankrupt law at all, even though it provide for a certain and complete discharge of the debtor. The English statute in which this involuntary provision first appears was exclusively a *fraudulent debtor's* act, and so designated (34 and 35 Hen. VIII. c. 4). But even though it

the burden of proving solvency shall be on the alleged bankrupt.¹

d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.²

e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.³

were a bankrupt law, it would not be a precedent of which Congress might take advantage on account of our constitution.

¹This is nothing more than saying that the petitioning creditors shall first establish their case. By so doing, a presumption of insolvency arises. The burden of proof then, and not before, shifts to the alleged bankrupt. If he can rebut the presumption by showing himself to be solvent, the court loses jurisdiction to proceed further. (See *West Co. v. Lea et al.* [U. S. Sup. Ct.], 19 Sup. Ct. Reporter, 836).

²The burden of establishing insolvency rests with the petitioner except where otherwise provided in this act; but when they make out a *prima facie* case, the burden then shifts to the alleged insolvent to establish his solvency (*In re Oregon Printing Co.*, 13 B. R. 503). The insolvency may be established by evidence of a letter written by the respondent stating that he was unable to pay his debts, in an effort to induce his creditors to accept a percentage of their claims (*In re Lange* [D. C.], 97 Fed. Rep. 197).

³See §69 relative to the bond, the showing required on the application here

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seisure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

SEC. 4. Who May Become Bankrupts.—*a* Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.¹

b Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil,² any

referred to, and the means open to the alleged bankrupt to enable him to retain possession.

¹Analogous provisions: Act 1841, §7; 1867, §11; R. S. §5014. As to the persons by whom proceedings may be conducted, see Rule IV.

A petition in bankruptcy cannot be verified by attorney except where the facts are within his own knowledge (*In re Nelson* [D. C.], 98 Fed. Rep. 76), but the irregularity will be waived unless objected to before pleading (*in re Simonson et al.* [D. C.], 1 N. B. News, 230; s. c. 92 Fed. Rep. 904; *Leidigh Carriage Co. v. Stengel* [C. C. A.], 1 N. B. News, 296; s. c. 95 Fed. Rep. 637). An adjudication, however, will not be set aside because of the petition being verified before the bankrupt's attorney unless it appear that he was attorney of record in a bankruptcy proceeding for the petitioner at the time; the fact that he subsequently became such did not affect the affidavit (*in re Kindt* [D. C.], 98 Fed. Rep. 403, citing 1 Enc. Pl. & Prac. 331).

Persons cannot become bankrupt who can defeat provable claims on the ground of coverture (*in re Duquid et al.* [D. C.], 100 Fed. Rep. 274; *in re Schlichter*, 2 B. R. 336), infancy (*in re Derby*, 8 B. R. 106; s. c. 6 Ben. 232), or insanity (*in re Weitzel*, 14 B. R. 466). *In re Derby* was a case under the act of 1867. One under that of 1841, *in re Book*, 3 McLean, 317, held to the contrary, while under the present act, the holding in both of these cases has been modified in that a minor who has been manumitted might become a bankrupt and be discharged from his debts (*in re Brice* [D. C.], 1 N. B. News, 276, 310; s. c. 93 Fed. Rep. 942). If, however, an act of bankruptcy be committed by one who is sane and afterwards becomes insane, involuntary bankrupt proceedings may be taken against the guardian (*In re Pratt*, 6 B. R. 276). An infant who is obligated on a claim for necessities, or affirms voidable ones on becoming of age, can become a bankrupt (*In re Derby*, 8 B. R. 106; s. c. 6 Ben. 232; *in re Cotton*, 2 N. Y. Leg. Obs. 370; *Farris v. Richardson*, 6 Allen, 118), as can also a married woman who becomes obligated in dealings relating to her own property (*Ex p. Mear*, 2 Bro. 266; *in re Kinkeade*, 3 Biss. 405; s. c. 7 B. R. 439; *in re O'Brien*, 1 B. R. 176; *in re Lyon*, 1 Cent. L. J. 133; *ex p. Franks*, 7 Bing. 764; *ex p. Carrington*, 1 Atk. 206; *ex p. Preston*, 1 Cooke, 40; *in re Collins*, 10 B. R. 335; s. c. 3 Biss. 415).

Since a proceeding in bankruptcy is equitable in its nature (*In re Weitzel*, 7 Biss. [C. C.], 290), jurisdiction will undoubtedly be taken of cases where the defenses at law above referred to are questionable.

²A person whose principal occupation is raising cattle and hogs for the market,

unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits,¹ owing debts to the amount of one thousand dollars² or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.

his farm being devoted chiefly to use as pasture land, and for raising grass, hay and corn wherewith to feed and fatten the stock, is not subject to be adjudged bankrupt on the petition of his creditors, being a farmer, though not a tiller of the soil (*In re Thompson* [D. C.], 102 Fed. Rep. 287).

The persons excluded from the operation of the bankruptcy act as farmers will not exempt a merchant who commits an act of bankruptcy, then abandons his mercantile business and engages and becomes chiefly occupied in farming (*In re Luckhardt* [D. C.], 101 Fed. Rep. 807).

¹An incorporated water company engaged in the business of obtaining, transporting, and supplying pure water for municipal and domestic use, though it obtains part of its water supply by purchase, is not "engaged principally in trading or mercantile pursuits," and cannot be adjudged bankrupt upon involuntary proceedings (*In re N. Y. & W. Water Co.* [D. C.], 98 Fed. Rep. 711). For the same reason, a corporation engaged in mining precious metals cannot be adjudged an involuntary bankrupt (*In re Elk Park Mining & Milling Co.* [D. C.], 101 Fed. Rep. 422; *in re Rollins Gold & Silver Min. Co.* [D. C.], 102 Fed. Rep. 982). It is the actual business referred to, whatever the provisions of the corporation's charter (*Ala. & Chat. R. R. Co. v. Jones*, 5 B. R. 97). It is the corporation as a unit or whole that may be adjudged bankrupt, rather than its members, notwithstanding a State statute makes them jointly and severally liable for the debts of the corporation (*James v. Atl. Delaine Co.*, 11 B. R. 390). A Corporation exists for the purpose of bankruptcy proceedings after its actual dissolution and until its debts are paid or its assets distributed (*In re Independent Ins. Co.*, 6 B. R. 169, 260; *in re Merchant's Ins. Co.*, 3 Biss. 162; s. c. 6 B. R. 43; *in re Washington Ins. Co.*, 2 Ben. 292; s. c. 2 B. R. 648). The appointment of a receiver for a corporation by a State Court will not oust the Federal Court of jurisdiction to adjudge it bankrupt under this provision (*In re Empire Metallic Bedstead Co.* [D. C.], 1 N. B. News, 301; s. c. 95 Fed. Rep. 957). An incorporated Sanitorium Co. comes within the meaning of this statute (*In re San Gabriel Sanitorium Co.* [D. C.], 1 N. B. News, 390; s. c. 95 Fed. Rep. 271), but an Insurance Company does not (*In re Cameron Town M. F. L. & W. Ins. Co.* [D. C.], 1 N. B. News, 383; s. c. 96 Fed. Rep. 756).

²Three or more creditors holding claims aggregating \$500 or over may file petition (§59 b). In computing the jurisdictional amount of debts, \$1,000, specified in §4, the claim of a creditor to whom a fraudulent preference had been given should be included (*In re Tierre* [D. C.], 95 Fed. Rep. 425; s. c. 1 N. B. News, 402); and in determining the number of creditors who may file involuntary petitions in accordance with §59, those who have previously filed their claims in a voluntary assignment in a State court may be included (*in re Folb* [D. C.], 1 N. B. News, 134; s. c. 91 Fed. Rep. 107; *in re Curtis et al.* [C. C. A.], 1 N. B. News, 357; s. c.

SEC. 5. Partners.¹—a A partnership, during the continuation of the partnership business, or after its dissolu-

94 Fed. Rep. 630; s. c. [D. C.], 91 Fed. Rep. 737; though such creditors are estopped from participating in the distribution of the estate unless they surrender what they received under the assignment (*In re Mills* [D. C.], 95 Fed. Rep. 269). The surrender of the dividend under the assignment is probably regarded as a repudiation of the assignment, at least such creditors must repudiate the part they took in the assignment proceedings before they will be permitted to become petitioning creditors in involuntary bankruptcy (*Simonson v. Sinsheimer* [C. C. A.], 95 Fed. Rep. 948, overruling *in re Romanow* [D. C.], 92 Fed. Rep. 510, which held that creditors who assented to such assignment could not maintain an involuntary petition alleging such assignment as the act of bankruptcy). If the petition is sufficient on its face as to the number of creditors and amount of indebtedness, the court will assume jurisdiction, and it will not permit any of the creditors joining in the petition to withdraw therefrom on a settlement of their claims, or for any other cause, when such act would affect the jurisdiction or jeopardize the proceedings (*In re Beddingfield* [D. C.], 1 N. B. News, 385; s. c. 96 Fed. Rep. 190). If, however, a petition be filed and afterward proves to be wanting in the number of creditors or amount of indebtedness, other creditors, on entering their appearance, will be allowed to join in the petition and will be reckoned as though they were original petitioners, without regard to the time when they appear (*In re Schwartz* [D. C.], 1 N. B. News, 266; *in re Romanow* [D. C.], 92 Fed. Rep. 510). A creditor of a partnership, being a creditor of each member of the firm, is entitled to join in a petition in involuntary bankruptcy brought against one of the partners individually (*In re Mercur* (two cases) [D. C.], 95 Fed. Rep. 634). See also § 18 and notes as to procedure in courts. So also creditors of a corporation who are directors of it may join as petitioners (*In re Rollins Gold & Silver Min. Co.* [D. C.], 102 Fed. Rep. 982).

¹Analogous provisions: Act of 1841, § 14; 1867, § 36; R. S. § 5121. There is no final settlement of the affairs of a firm within the meaning of bankruptcy law, until its debts are paid, or extinguished in some other way, and an adjudication may be made upon the voluntary petition of the partners alleging that there are unsatisfied firm debts, though there are no assets, and notwithstanding an individual petition will lie (*In re Hirsch et al* [D. C.], 97 Fed. Rep. 571). The partnership need file but one petition; on this the firm and each partner may be discharged, there being but one proceeding and only one filing fee required (*In re Langslow* [D. C.], 98 Fed. Rep. 869). An individual's act of bankruptcy against firm property will authorize the adjudication of the firm upon an involuntary petition, but not an adjudication of an individual of such firm who did not participate in such act of bankruptcy (*In re Meyer* [C. C. A.], 98 Fed. Rep. 976). The petition of a partnership will not warrant the discharge of its members from individual debts unless particularly prayed (*In re Russell* [D. C.], 97 Fed. Rep. 32). A surviving partner may be declared an involuntary bankrupt for acts against the partnership property (*in re Stevens*, 5 B. R. 112; s. c. 1 Saw. 397), though not for acts of a liquidating partner against firm property (*Chemical Nat. Bank v. Meyer* [D. C.], 1 N. B. News, 304; s. c. 92 Fed. Rep. 896). Still, if the firm be insolvent, a general assignment of the firm's property by a liquidating partner is an act of bankruptcy on which such partner may be adjudged bankrupt as an individual (*In re Meyer* [C. C. A.], 98 Fed. Rep. 976).

A member of a firm may be adjudged a bankrupt as to firm obligations (*in re Melick*, 4 B. R. 97), and one who assumes partnership obligations, even though discharged as a member of a firm that goes into bankruptcy (*In re Sheppard*, 3 B. R. 172; *Chemical Nat. Bank v. Meyer* [D. C.], 1 N. B. News, 304; s. c. 92 Fed.

tion and before the final settlement thereof, may be adjudged a bankrupt.¹

b The creditors of the partnership shall appoint the trustee;² in other respects so far as possible the estate shall be administered as herein provided for other estates.

Rep. 896), since he might be held by the creditors as for an individual obligation (*In re Downing*, 3 B. R. 748; *in re Long*, 9 B. R. 227; *in re Collier, Taylor & Co.*, 12 B. R. 266; *in re Rice*, 9 B. R., 373). A firm may be adjudged bankrupt, though none of its members be so adjudged (*Chemical Nat. Bank v. Meyer* [D. C.], 1 N. B. News, 304; s. c. 92 Fed. Rep. 896). Its business is never settled so long as firm debts remain unpaid, though the firm assets have been swept away (*In re Levy* [D. C.], 95 Fed. Rep. 812). Yet, proceeding individually, any member of a firm may be adjudged bankrupt and obtain a discharge of his individual liability, and also of his partnership liability, even though his copartners be refused a discharge (*In re George & Proctor*, 1 Lowell, 409; *in re Schofield*, 3 B. R. 551; *in re Downing*, 3 B. R. 748; s. c. 1 Dill. 33), or if they oppose the bankruptcy of the copartnership after its dissolution, though its debts are outlawed (*In re Richman & Levy* [D. C.], 1 N. B. News, 287). A liquidating partner who makes an assignment of the firm's property commits an act of bankruptcy for which he may be adjudged bankrupt individually, his copartner not being so liable (*Chemical Nat. Bank v. Meyer, supra*). Whenever a husband and wife are jointly liable under the law of their residence or domicile, they may file a partnership petition in bankruptcy (*In re Ray* [D. C., Wash.], 1 N. B. News, 276), and they may undoubtedly do so in states where community law prevails, that is, where, after coverture, property acquired vests in the husband and wife jointly. (See 1 N. B. News, 192.) It should be remembered in this connection that where the law is silent, as in this instance, equity practice prevails, and whatever is true as to voluntary petitions will apply to involuntary ones.

If two persons are jointly liable upon an obligation and one goes into bankruptcy, the other who pays the full obligation after the petition is filed cannot offset a debt which he owes the bankrupt against the bankrupt's share of the joint obligation; he must pay the full amount of his debt to the trustee and the trustee should pay him a dividend on the bankrupt's share of the partnership claim so paid (*In re Bingham* [D. C.], 1 N. B. News, 351; s. c. 94 Fed. Rep. 796). See index *infra* petition, specifications and dividend—also §14 and notes relating to the discharge of partners on firm and individual petitions.

¹Though the partnership, as such, may be adjudged bankrupt, if one of its members be an infant, such infant cannot be so adjudged individually (*In re Duquid et al.* [D. C.], 100 Fed. Rep. 274). A petition filed against one partner individually will not authorize an adjudication of others who were partners with him, even though they voluntarily appear and consent to such adjudication (*Mahoney et al. v. Ward* [D. C.], 100 Fed. Rep. 278).

The bankruptcy court has jurisdiction of a petition filed by a surviving partner though the partnership effects are in course of administration in a State court, if such effects can be obtained by the referee without forcibly interfering with the custody of the administrator (*In re Pierce* [D. C.], 102 Fed. Rep. 977).

²See §44 as to appointment, §45 as to qualifications, §46 as to death or removal, §47 as to duties, §48 as to compensation, §49 as to accounts and papers of, and §50 as to bonds of trustee.

c The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners' and of the administration of the partnership and individual property.²

d The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.³

f The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts.⁴ Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g The court may permit the proof of the claim⁵ of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership

²This subdivision evidently refers to proceedings to adjudge the firm and all the members bankrupt, and the jurisdiction must be within the meaning of §2 (1). See *in re Boylan*, 1 B. R. 2.

³The court of bankruptcy will determine what is and what is not partnership and individual property when that question is raised (*Hiscock v. Green*, 12 B. R. 507; *Osborn v. McBride*, 16 B. R. 22; s. c. 3 Saw. 570).

⁴See §62 relative to expenses of administering estates.

⁵When all the members of a firm sign an obligation in their individual names, the weight of authority is that the debt is individual as to each, and not partnership (*In re Webb*, 2 B. R. 614; *in re Bucyrus Machine Co.*, 5 B. R. 303; *in re Miller*, 1 N. Y. Leg. Obs. 38; *in re Herrick*, 13 B. R. 312; *in re Roddin*, 6 Biss. 377), though this rule is not uniform (*In re Warren*, 2 Ware. 322).

⁶See §57 as to proof and allowance of claims, §63 as to debts which may be proved, and §64 as to debts which have priority.

estate and individual estates so as to prevent preferences¹ and secure the equitable distribution of the property of the several estates.

h In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.*

SEC. 6. Exemptions of Bankrupts.³—*a* This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the

¹See §§3 (2, 3), 60 and notes as to preference. Also §67 as to liens.

When one partner files a petition for a discharge from both individual and firm debts and is adjudged a bankrupt, but no adjudication is made against the partnership as such, the creditors of the firm may prove their debts against the bankrupt and cause his interest in the firm property to be subjected to the payment thereof under this paragraph (*In re Laughlin* [D. C.], 96 Fed. Rep. 589). See also §14 as to discharges and §17 as to debts not affected, together with the notes to these sections.

²The partners not to be adjudged bankrupt should be in some manner brought before the court so as to subject them to its jurisdiction. They occupy a position similar to that of debtors. If they neglect to settle up the partnership business and account to the trustee as contemplated, he may have them impleaded with the bankrupt (§2 [6]), the court having authority to make such orders, issue such process, and enter such judgments as may be necessary (§2 [15]). When a fraudulent preference is attempted to be created by converting an individual obligation into a firm one without consideration, the court will not allow the same to be proved against the partnership estate (*In re Jones et al.* [D. C.], 100 Fed. Rep. 781).

³Analogous Provisions: Act 1800 §§18, 34, 35, 53; Act 1841, §3; Act 1867, §14, as amended by Act of June 8, 1872, Ch. 330; and Act of March 23, 1873, Ch. 235.

See §8 as to dower and allowances. The constitutional power by which congress is authorized to enact laws on the subject of bankruptcies (U. S. Const., Art. I, §VIII, ¶4) requires such laws to operate uniformly throughout the United States (*In re Silverman*, 4 B. R. 523; *in re Reiman & Friedlander*, 11 B. R. 21; *Leidigh Carriage Co. v. Stengel* [C. C. A.], 1 N. B. News 296, 387; s. c. 95 Fed. Rep. 637). In Texas, one is entitled to an exemption as high as \$5,000, and under certain circumstances much more than that. In Maryland, he is entitled to only \$100. If this section means that a bankrupt will be entitled to the State exemption, and there appears to be no other construction put upon the language (*In re Rouse, Hazard & Co.* [C. C. A.], 1 N. B. News, 75; s. c. 91 Fed. Rep. 96; *in re Lange* [D. C.], 1 N. B. News, 44, 60; s. c. 91 Fed. Rep. 361; *in re Tilden* [D. C.], 1 N. B. News, 134; s. c. 91 Fed. Rep. 500; *in re Camp* [D. C.], 1 N. B. News, 142; s. c. 91 Fed. Rep. 745; *in re Garden* [D. C.], 1 N. B. News, 189; s. c. [Sup.

time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater

Ct.), 93 Fed. Rep. 423; s. c. [Sup. Ct.], 1 N. B. News, 298; *in re Grimes* [D. C.], 1 N. B. News, 339; s. c. 94 Fed. Rep. 800; *in re Coffman* [D. C.], 1 N. B. News, 326; s. c. 93 Fed. Rep. 422; *in re Smith* [D. C.], 93 Fed. Rep. 791; *in re Richard* [D. C.], 94 Fed. Rep. 633; *in re Friederick* [D. C.], 95 Fed. Rep. 282; *in re Hill* [D. C.], 96 Fed. Rep. 185; *in re Woodruff* [D. C.], 1 N. B. News, 423; *in re Woodard* [D. C.], 1 N. B. News, 430; *in re Peterson* [D. C.], 1 N. B. News, 430; s. c. 95 Fed. Rep. 417; *in re Schiller* [D. C.], 96 Fed. Rep. 400; *in re Grimes* [D. C.], 96 Fed. Rep. 529; *in re Russie* [D. C.], 96 Fed. Rep. 609; *in re Daubner* [D. C.], 96 Fed. Rep. 805; *in re Thomas* [D. C.], 96 Fed. Rep. 828; *in re Smith* [D. C.], 96 Fed. Rep. 832; *in re Baumann* [D. C.], 96 Fed. Rep. 946; *in re Lentz* [D. C.], 97 Fed. Rep. 486; *in re Hoag* [D. C.], 97 Fed. Rep. 543; *in re Jones* [D. C.], 97 Fed. Rep. 773; *in re Buelow* [D. C.], 98 Fed. Rep. 86; *in re Boston* [D. C.], 98 Fed. Rep. 587; *in re Pope* [D. C.], 98 Fed. Rep. 722; *in re Harrington* [D. C.], 99 Fed. Rep. 390; *in re McBryde* [D. C.], 99 Fed. Rep. 686; *in re Bean* [D. C.], 100 Fed. Rep. 262; *in re Duquid et al.* [D. C.], 100 Fed. Rep. 274; *in re Friedrich et al.* [C. C. A.], 100 Fed. Rep. 284; *in re Brown* [D. C.], 100 Fed. Rep. 441; *in re McCulchen* [D. C.], 100 Fed. Rep. 779; *in re Diller* [D. C.], 100 Fed. Rep. 931; *in re Beauchamp et al.* [D. C.], 101 Fed. Rep. 106; *in re Waxelbaum* [D. C.], 101 Fed. Rep. 228; *in re Wilson et al.* [D. C.], 101 Fed. Rep. 571; *in re Lynch* [D. C.], 101 Fed. Rep. 579; *in re Hatch* [D. C.], 102 Fed. Rep. 280; *in re Myres* [D. C.], 102 Fed. Rep. 869; *in re Buckingham* [D. C.], 102 Fed. Rep. 972; *in re Tobias* [D. C.], 103 Fed. Rep. 68), then the bankrupt in Texas could reserve from his creditors fifty times as much as the bankrupt in Maryland would be entitled to withhold. The pro rata dividend to be distributed would be very materially affected by this inequality of exemption. Is there any reasonable construction that can be placed upon this section which will bring it within the requirement of uniform operation throughout the United States? If so, it is constitutional; if not, it is unconstitutional. This question had been raised under the previous act, but the courts do not seem to have agreed upon it (*In re Beckerford*, 1 Dill. 45; s. c. 4 B. R. 203; *in re Smith*, 8 B. R. 401; *in re Kean & White*, 8 B. R. 367; *in re Jordan*, 8 B. R. 180; *in re Deckert*, 1 A. L. T. [N. S.], 336; s. c. 10 B. R. 1; s. c. 6 C. L. N. 310; *in re Duerson*, 13 B. R. 183; *in re Dillard*, 9 B. R. 8).

A voluntary bankrupt must claim his exemption at the time he files his petition, though the same is not to be severed from the remainder of the estate until the same is done by the trustee after the valuation is made (*In re Friedrich et al.* [C. C. A.], 100 Fed. Rep. 284). Should the valuation be questioned, the court may order the trustee to have the exemption re-appraised (*In re McBryde* [D. C.], 99 Fed. Rep. 686).

The title to exempt property does not pass to the trustee, though he is entitled to such possession as will enable him to have it appraised (§700), after which it is his duty to set it apart on the approval of his report thereon by the court (§47a[1]), notwithstanding any contrary method prescribed by a state law (*In re Camp* [D. C.], 1 N. B. News. 142; s. c. 91 Fed. Rep. 745; *in re Peterson*, 95 Fed. Rep. 417), or any agreement between the bankrupt and creditors that his exemption should be allotted by appraisers, such allotment being the duty of the trustee (*In re Grimes* [D. C.], 96 Fed. Rep. 529). It has been held, however, that the manner of setting apart the exemption should follow that of the State law so far as possible (*In re McCutchen* [D. C.], 100 Fed. Rep. 779), though the method has been said to be governed by the bankruptcy rather than by the State law (*In re Lynch* [D. C.], 101 Fed. Rep. 579). If the exemption be such that a partition cannot be made without injury, the property may be sold by the trustee and the exemption paid out of the proceeds (*In re Diller* [D. C.], 100 Fed. Rep. 931). The

portion thereof immediately preceding the filing of the petition.

trustee has no right to demand a bond of indemnity before setting the exemption apart, and if he sells it, the bankrupt may claim the value of his exemption out of the proceeds (*In re Brown* [D. C.], 100 Fed. Rep. 441). If the bankrupt fails to select his exemption and the same be sold, it is the duty of the trustee and referee to adopt some plan to correct the mistake (*In re Woodard* [D. C.], 1 N. B. News, 430; s. c. 95 Fed. Rep. 260). Under the former law, a somewhat different rule prevailed, which may still be regarded as a precedent in some jurisdictions, it being held that if he failed to claim his exemptions, his rights thereto would be affected in accordance with the law of the state wherein the exemption arose (*Goodale v. Tuttle*, 7 B. R. 193). If the bankrupt voluntarily allows his exemption to be sold, that course being for the benefit of the estate, the trustee must allow the bankrupt out of the proceeds of the sale, a sum equal to the value of the exemption (*In re Richard* [D. C.], 94 Fed. Rep. 633). A bankrupt is not entitled to his exemption as against a judgment note waiving the same (*In re Garden* [D. C.], 1 N. B. News, 189; s. c. 93 Fed. Rep. 423). Yet, while the bankruptcy court has jurisdiction to enforce the rights of creditors holding notes containing a waiver of the exemption (*In re Woodruff* [D. C.], 1 N. B. News, 423), it will not restrain control over a homestead when so waived (*In re Hill* [D. C.], 96 Fed. Rep. 185), but will ordinarily leave the parties to such remedies as they may have in the state court relative to liens on or controversies arising out of the exemption (*In re Bass*, 3 Woods, 382; *in re Camp* [D. C.], 1 N. B. News, 142; s. c. 91 Fed. Rep. 745).

Each partner is entitled to his exemption out of the partnership property (*In re Friederick* [D. C.], 95 Fed. Rep. 282; *in re Grimes* [D. C.], 1 N. B. News, 339; s. c. 94 Fed. Rep. 800), if the State law provides therefor (*In re Beauchamp et al.* [D. C.], 101 Fed. Rep. 106); but if he be merely a nominal partner and his interest in the partnership assets does not amount to the exemption, then he is not so entitled (*In re Camp* [D. C.], 1 N. B. News, 142; s. c. 91 Fed. Rep. 745). The right to this exemption continues so long as the individual remains a member of the partnership, though he may have entered into an agreement conditioned to withdraw therefrom on certain unfulfilled conditions (*In re Wilson et al.* [D. C.], 101 Fed. Rep. 571). When a State statute provides for the exemption of the tools and implements of a mechanic or artisan, it is the duty of the trustee to set them aside (*In re Peterson* [D. C.], 1 N. B. News, 430; s. c. 95 Fed. Rep. 417).

An endowment insurance policy held by the bankrupt and payable to himself is not exempt (*In re Lange* [D. C.], 1 N. B. News, 60; s. c. 91 Fed. Rep. 361).

Contests as to exemptions will not be heard by the court until a trustee is appointed; exceptions to the trustee's action may then be heard by the referee and certified to the court (*In re Smith* [D. C., Tex.], 93 Fed. Rep. 791).

So far as the question has thus far arisen, the District Courts are divided as to whether the court of bankruptcy has jurisdiction to enforce liens on the bankrupt's exemptions, it being held that where a creditor held the bankrupt's note containing a waiver of the exemption, such court had jurisdiction to enforce it (*In re Schiller* [D. C.], 96 Fed. Rep. 400), though if the exempt property be set apart, the bankruptcy court has no jurisdiction either to defend it from adverse claims or enforce liens upon it (*In re Grimes* [D. C.], 96 Fed. Rep. 529; *in re Hatch* [D. C.], 102 Fed. Rep. 280).

Lands allotted to an Indian, in Indian Reservation, being exempt under the Federal law, are exempt under the bankruptcy law and will not vest in his trustee on an adjudication in bankruptcy (*In re Russie* [D. C.], 96 Fed. Rep. 609).

If the exemption under the State law consists of a stock of goods not divisible without loss, nor salable except as a whole, the court cannot order the trustee to

SEC. 7. Duties of Bankrupts.—*a* The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court;¹ (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee;² (8) prepare, make oath to and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt,³ and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the

sell the whole and pay the bankrupt the value of the exemption (*In re Grimes* [D. C.], 96 Fed. Rep. 529).

¹The court may lawfully order a bankrupt to turn over to his trustee all property which he has in his possession or under his control belonging to his estate, and for disobeying such order, punish him for contempt, imprisonment for such disobedience not being an imprisonment for debt within the meaning of State laws (*In re Deuell* [D. C.], 100 Fed. Rep. 633; *in re Tudor* [D. C.], 100 Fed. Rep. 796; *in re Rosser* [C. C. A.], 101 Fed. Rep. 562; *Ripon Knitting Works et al. v. Schreiber* [D. C.], 101 Fed. Rep. 810; *in re Schlesinger* [C. C. A.], 102 Fed. Rep. 117).

²If no trustee be appointed so that the bankrupt may inform him of the false claim, it is his duty to object to its allowance (*In re Ankeny* [D. C.], 100 Fed. Rep. 614).

³If the bankrupt is absent or cannot be found, the petitioner in involuntary proceedings must file the schedule within *five* days after adjudication (Rule IX). Estates of remainder should be included in it as well as other assets (*In re Schenberger* [D. C.], 102 Fed. Rep. 978). The schedule should also include all colorable transfers (*In re Hoffman* [D. C.], 102 Fed. Rep. 997).

referee, and one for the trustee;¹ and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate;² but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

¹Debts due to a firm should be scheduled in the firm name, not in the names of the individuals comprising it (Anon 1 B. R. 123).

If any of the claims set out in the schedule are legally questionable, or affected by the statute of limitations, special attention should be drawn to these facts (*In re Kingsley*, 1 B. R. 329; *in re Perry*, 1 B. R. 220; *in re Ray*, 1 B. R. 203; s. c. 2 Ben. 253; *in re Wright*, 6 Biss. 317; *in re Harden*, 1 B. R. 395). If the bankrupt has an interest in any copartnership, that interest should be stated, but not the specific articles belonging to the firm (*In re Norcross*, 1 N. Y. Leg. Obs. 100; *in re Beal*, 2 B. R. 587; s. c. 1 Lowell, 323). The schedule should be an itemized statement of all the property of whatever name or character in which the bankrupt has any right, title or interest in law or equity (*In re Hirsch* [D. C.], 96 Fed. Rep. 468; *in re Laughlin* [D. C.], 96 Fed. Rep. 589; *in re Pierce & Holbrook*, 3 B. R. 258; *Ashley v. Robinson*, 29 Ala., 112; *in re O'Bannon*, 2 B. R. 15; *in re Hussman*, 2 B. R. 437), though others may claim title adversely (*In re Beal*, 2 B. R. 587; s. c. 1 Lowell, 323). This embraces all assignable rights of action, whether the damages are liquidated or unliquidated (*In re Orne*, 1 Ben. 361; s. c. 1 B. R. 57), but not such as abate on death (*Crockett v. Jewett*, 2 Ben. 514; s. c. 2 B. R. 208) including judgment debts appearing of record and unsatisfied (*Sellers v. Bell* [C. C. A.], 94 Fed. Rep. 801). It is the duty of referees to see that defective schedules are amended (§39[2]); and if the bankrupt discovers errors, he should amend the schedule at once, which it seems he may do *ex parte*, without notice to the creditors and upon a *pro forma* order (*In re Watts*, 2 B. R. 447; s. c. 3 Ben. 166), at any time before his discharge (*In re Heller*, 5 B. R. 46; *in re Connell*, 3 B. R. 443; *in re Preston*, 3 B. R. 103). The better practice, however, would be to apply for leave to amend (Rule XI). Omissions will not affect the rights of creditors who have no notice of the proceedings (§17[3]), and wilfully incorrect schedules may subject the bankrupt to imprisonment (§29 b) and bar him from a discharge (§14 b).

As to false oaths touching schedules, see §14 relative to discharges and §29 b touching offenses, together with notes to these sections.

²The examination is similar to that of a judgment debtor in supplementary proceedings (*In re Pioneer Paper Co.*, 7 B. R. 250; *in re Stuyvesant Bank*, 7 B. R. 445), and any actual creditor is entitled to an order for it, though he has not proved his claim (*Camp v. Zellars* [C. C. A.], 94 Fed. Rep. 799; *In re Jehu* [D. C.], 94 Fed. Rep. 638). It may be ordered by the court of its own motion (*In re Belden & Hooker*, 4 Ben. 225; *in re Patterson*, 1 Ben. 448; s. c. 1 B. R. 100; *in re Macintire*, 1 B. R. 11; *in re Pioneer Paper Co.*, 7 B. R. 250; *in re Lanier*, 2 B. R. 154), or on an oral or written application by the trustee or a creditor, upon a showing that it would inure to the benefit of the estate or establish objections to a discharge (*In re Mellen* [D. C.], 97 Fed. Rep. 326; *in re Lanier*, *supra*; *in re Adams*, 2 Ben. 503;

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

SEC. 8. Death or Insanity of Bankrupts.—*a* The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided,* That in case of death the widow and children shall be entitled to all

s. c. 2 B. R. 95; *in re Vetterlein*, 5 Ben. 7; s. c. 4 B. R. 599; *in re Solis*, 4 Ben. 143; s. c. 4 B. R. 68), at any stage of the proceedings, before the first meeting of creditors (*In re Franklin Syndicate et al.* [D. C.], 101 Fed. Rep. 402), and even after a petition for a discharge (*In re Price* [D. C.], 1 N. B. News, 131; s. c. 91 Fed. Rep. 635; s. c. 92 Fed. Rep. 987). The bankrupt may not refuse to take the oath before the referee (*In re Scott* [D. C.], 1 N. B. News, 161; s. c. 95 Fed. Rep. 815), or to give testimony in actions between the trustee and third parties on the ground that it would incriminate him, he being in this respect protected by this subdivision (*Mackel v. Rochester* [C. C. A.], 102 Fed. Rep. 314), and he should answer all material questions of the trustee or any creditor, or their attorneys (*In re Hayden* [D. C.], 1 N. B. News, 265; s. c. 96 Fed. Rep. 199), for a refusal may be contempt (§41; *in re Vogel*, 5 B. R. 393), as may also an evasive answer, such as "I don't recollect," to facts necessarily within his knowledge (*In re Salkey & Gerson*, 11 B. R. 423, citing and reviewing the English cases. See also *in re Mooney*, 15 B. R. 456), and an actually and wilfully false answer relative to his property or debts will be perjury (*U. S. v. Dickey*, 1 Morris, 412), though, perhaps, not so punishable (*In re Marx et al.* [D. C.], 102 Fed. Rep. 676). The inquiries, however, should be reasonably pertinent, and if they become unreasonably discursive, the expense must be borne by the examining parties (*In re Forest* [D. C.], 1 N. B. News, 258; s. c. 93 Fed. Rep. 190). The inquiry, however, is not limited to facts and transactions occurring within four months prior to the bankruptcy, but may be directed to matters anterior to that time (*In re Brundage* [D. C.], 100 Fed. Rep. 613). A creditor is not bound by an examination made by others—he, himself, may examine in his own way (*In re Vogel*, 5 B. R. 393), though it should not unnecessarily oppress or annoy the bankrupt (*In re Gilbert*, 3 B. R. 152). After the bankrupt has once submitted to an examination, an order for a further examination will not be granted on an *ex parte* application—the bankrupt is entitled to notice and has a right to be heard (*In re Gilbert*, 3 B. R. 152; *in re Van Tuyle*, 2 B. R. 70; *in re Robinson & Chamberlain*, 2 B. R. 516; *in re Frisbie*, 13 B. R. 349).

The bankrupt cannot refuse to answer a question on the ground that it tends to discredit or degrade him (*In re Richards*, 4 Ben. 303), but he may do so if it

rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.¹

SEC. 9. Protection and Detention of Bankrupts.²—

a A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not

tends to criminate him (*In re Koch*, 1 B. R. 549; *in re Patterson*, 1 B. R. 147; s. c. 1 Ben. 508; *in re Scott* [D. C.], 1 N. B. News, 161; s. c. 95 Fed. Rep. 815. *Contra*, *in re Bromley*, 3 B. R. 686). Whether a wife may testify for or against her husband in a bankruptcy proceeding is still an open question, some courts holding the affirmative (*In re Forest*, *supra*), and others the negative (*in re Fowler* [D. C.], 1 N. B. News, 265; s. c. 93 Fed. Rep. 417).

As to what amounts to a false oath relative to the schedules, see §29 *b* and notes to same. See also §58 *a* (1) as to notice of examination to be given creditors.

¹Analogous provisions: Act 1800 § 45; 1867, §12; R. S., §5090. The provision is to dower and allowance appeared in no former act.

²Analogous provisions: Act of 1800, §§22, 38, 60; 1867, § 26; R. S. §5107. See also Act 1867, §40; R. S. §5024, relative to arrest of bankrupt. One under arrest at the time of becoming a bankrupt is not entitled, because of his petition in bankruptcy, to a release from such arrest (*In re Walker*, 1 B. R. 318; s. c. 1 Lowell, 222; *Minon v VanNorstrand*, 4 B. R. 108; s. c. 1 Lowell, 458; *in re Casey* [D. C.], 1 N. B. News, 166); and if he be out on bail, the court of bankruptcy will not intervene to prevent his bail surrendering him to the jailor (*In re Cheney*, 5 Law Rep. 19; *Hasleton v. Valentine*, 2 B. R. 31; *in re Rank*, Crabbe 493), though on this, the courts are not agreed (*Foxall v. Levi*, 1 Cranch C. C. 139; *Lingan v. Bayley*, 1 Cranch C. C. 112).

The proper practice for procuring the release of a bankrupt improperly arrested is to move for a discharge before the State court which issued the warrant, for it is the duty of that court to release the bankrupt (*In re Migel*, 2 B. R. 481; *in re Wiggers*, 2 Biss. 71; *in re O'Mara*, 4 Biss. 506; *in re Simpson*, 2 B. R. 47); and the Federal courts will not intervene by *habeas corpus* until the State court has had an opportunity to hear and decide the Federal question involved (*U. S., ex rel Scott v. McAleen* [C. C. A.], 1 N. B. News, 265). If the State court fails in its duty, the court of bankruptcy in a proper case will discharge the prisoner on a motion or on *habeas corpus* (*In re Wiggers*, *supra*; *in re Williams & McPheeters*, 11 B. R. 145; s. c. 6 Biss. 233; *in re Simpson*, *supra*; *in re Glaser*, 2 Ben. 180; s. c. 1 B. R. 336; *in re Taylor*, 16 B. R. 40. See also Rule XXX as to imprisoned debtors). The discharge of the prisoner may be made by any court of bankruptcy which can acquire jurisdiction of the person detaining the bankrupt, without regard to the district in which he may be confined or where the proceedings in bankruptcy may be pending (*In re Seymour*, 1 Ben. 348; s. c. 1 B. R. 29. See also *Lathrop v. Drake*, 91 U. S. 516; s. c. 13 B. R. 472; *Hasleton v. Valentine*, 2 B. R. 31; s. c. 1 Lowell, 270). An action for escape will not lie against an officer who releases a prisoner in obedience to an order from a court of bankruptcy (*Thomas v. Hudson*, 13 Mees. & W. 353, 816, 884; *Norton v. Walker*, 3 Excheq. 480), nor can a State court

be a release,¹ and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act.²

b The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the

punish one for obeying such order (*In re Kimball*, 1 B. R. 193; *in re Hurst*, 4 Dallas, 387; *Lyell v. Goodwin*, 4 McLean, 32), since a disobedience would be contempt.

A bankrupt who withholds money from the trustee, alleged to be lost, will be committed for contempt if the facts are so transparent as to rebut his allegation (*In re Purvine* [D. C.], 1 N. B. News, 326).

A State court has no authority to imprison a bankrupt for failure to pay alimony (*In re Houston* [D. C.], 1 N. B. News, 305; s. c. 94 Fed. Rep. 119).

¹As to the debts not affected by a discharge in bankruptcy, see §17. The court of bankruptcy, treating the question of the release of the debt on which the arrest was made or one of fact, will carefully examine all legal evidence brought before it on an application to discharge the bankrupt from an arrest (*In re Alsberg*, 16 B. R. 116; *in re Williams & McPheeters*, 11 B. R. 145; s. c. 6 Biss. 233; *in re Glaser*, 1 B. R. 336; s. c. 2 Ben. 180; *in re Kimball*, 1 B. R. 193), and if the debt is one not affected by a discharge in bankruptcy, the bankruptcy court will not discharge him from the arrest under State process. This, too, even though Rule XXX authorizes his release if the debt or claim is one provable in bankruptcy, that rule being subordinate to the provisions of this section (*In re Baker* [D. C.], 96 Fed. Rep. 954), though an earlier tendency of the courts had been to rest the decision on an examination of the *ex parte* showing made before the State court issuing the warrant, leaving the question of fact, the release of the debt, to be determined by the State court if jurisdiction in the State court appeared upon the face of the proceedings (*In re Robinson*, 2 B. R. 342; s. c. 36 How. Pr. 176; s. c. 6 Blatch. 253; *in re Valk*, 3 B. R. 278; s. c. 3 Ben. 431; *in re Kimball*, 2 B. R. 354; s. c. 6 Blatch. 292; s. c. 2 Ben. 554). If, however, the proceeding in the State court is based on the fraudulent contraction of the debt on which the bankrupt is arrested, and has proceeded to judgment, the court of bankruptcy will consider itself bound by the finding of facts by the State court (*In re Whitehouse*, 4 B. R. 63; s. c. 1 Lowell, 429; *Shuman v. Strauss*, 52 N. Y. 404; *in re Patterson*, 1 B. R. 307; s. c. 2 Ben. 155).

²The exemption of the bankrupt from arrest on civil process from a State court is not to be restricted to the particular occasions when he is physically in attendance in court, or actually engaged in performing a required duty, but is extended by Rule XII to the whole period of time during which he is under the jurisdiction of the court of bankruptcy—until he is discharged or the court from any cause loses jurisdiction of the proceedings (*In re Lewensohn* [D. C.], 99 Fed. Rep. 73).

court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him; until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.¹

SEC. 10. Extradition of Bankrupts.—*a* Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

SEC. 11. Suits by and Against Bankrupts.—*a* A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until the twelve months after the date of said adjudication, or, if

¹In its report on this act to the House on Dec. 16, 1897, the Judiciary Committee explained that this paragraph was only intended to apply to bankrupts who were about to leave the district for the sole purpose of avoiding an examination, and said that "if he left for other purposes, such as to better his condition, the provisions of the law will not apply to him." The warrant upon which the bankrupt is arrested need not state that he is to be brought before the court for examination. In addition to the warrant here authorized, the court may issue an order in the nature of a writ of *ne exeat* under the provisions of §2 [15] (*In re Lipkie et al.* [D. C.], 98 Fed. Rep. 970). The facts and circumstances on which the affiants reach their conclusion as to the intention of the bankrupt must be set out (*In re McKibben*, 12 B. R. 97; *in re Hadley*, 12 B. R. 366; *ex p. Heyman*, 26 L. T. N. S. 339).

within that time such person applies for a discharge, then until the question of such discharge is determined.¹

¹The language, "filing of a petition against him," has reference to both the voluntary and the involuntary bankrupt (§1[1]). It is a suit to press a personal liability and not one to enforce a valid lien to which the stay applies (*Mason v. Warthens*, 14 B. R. 341), the act not being intended to affect such liens (§67d). The stay will reach suits began against the bankrupt after adjudication as well as those pending at the time of the filing of the petition (*In re Basch* [D. C.], 97 Fed. Rep. 761), though it will not be granted when the debt would not be released by a discharge, as alimony (*In re Anderson* [D. C.], 97 Fed. Rep. 321), though as to that there is a difference of judicial opinion (*In re Challoner* [D. C.], 98 Fed. Rep. 82). If, however, the enforcement of the lien will injuriously affect the estate of the bankrupt, the court will undoubtedly restrain the proceedings, especially when it will not injure the lienor. It is of no consequence in what court the proceedings may be pending, for a stay will reach them in a court of appellate as well as in a court of original jurisdiction (*In re Metcalf & Duncan*, 2 Ben. 78; s. c. 1 B. R. 201; *Merritt v. Glidden*, 39 Cal. 559; s. c. 5 B. R. 157; s. c. 2 Am. Rep. 479). And so long as the purpose is the same, the character of the proceedings (*In re Whipple*, 13 B. R. 373; *in re Migel*, 2 B. R. 481; *in re Rosenberg*, 2 B. R. 236; *in re Duncan*, 14 B. R. 18; *in re Schwartz*, 15 B. R. 330), or the stage of their advancement (*In re Metcalf & Duncan*, *supra*; *Zimmer v. Schleehauf*, 115 Mass. 52; s. c. 11 B. R. 313) is of no consequence. The application for the stay may be made by either the bankrupt or the trustee, and probably by a creditor injuriously affected by the suit, to the State court (*In re Frostman & Hicks*, 15 B. R. 41), or to the bankruptcy court (*In re Meyers*, 1 B. R. 581; *in re Reed*, 1 B. R. 1; *in re Jacoby*, 1 B. R. 118; *Sampson v. Burton*, 4 B. R. 1; s. c. 5 Ben. 325), the latter being preferable (*In re Basch* [D. C.] 97 Fed. Rep. 761). When the order to stay is made by the bankruptcy court, the injunction is directed to the suitor and not to the State court (*In re Meyers*, *supra*), though a better practice would be to direct it to both, since the State court is subject to the supervisory direction of the bankruptcy court. The action of the district court will not be disturbed on appeal unless it appears that there was an abuse of discretion (*In re Lesser et al.* [C. C. A.], 99 Fed. Rep. 913). When a suit is not stayed, a judgment entered in it is not a nullity (*Ewart v. Schwartz*, 48 N. Y. Superior, 390; *Flannigan v. Pearson*, 14 B. R. 37; s. c. 42 Tex. 1), but its collection may be defeated by setting up the discharge in bankruptcy of the debt on which the judgment is founded (*McDonald v. Davis*, 105 N. Y. 508).

In considering the application for a stay, when the order is discretionary, the court should weigh the effect the stay would have on the rights of third persons and consider the rights the suing creditor might have against persons or bodies that are collaterally liable, or may become co-debtors; if the effect is injurious, the order to stay should not be made (*Shellington v. Howland*, 53 N. Y. 371; *Allen v. Ward*, 36 N. Y. Superior, 290; *Ansonia Co. v. Chimney Co.*, 10 B. R. 355; *Meyer v. Aurora Ins. Co.*, 7 B. R. 191; *Cooper v. Troy Woolen Co.*, 11 Abb. Pr. [N. S.], 353; *Allen v. Soldier's B. M. & D. Co.*, 4 B. R. 537; *Hoyt v. Freel*, 4 B. R. 131; s. c. 8 Abb. Pr. [N. S.], 220; *in re Ghiradelli*, 4 B. R. 164; s. c. 1 Saw. 343). A judgment may be rendered in a suit commenced after adjudication in bankruptcy when the claim is in danger of being lost under the statute of limitations. A judgment so rendered will establish the claim and stop the running of the statute (*In re McBryde* [D. C.], 99 Fed. Rep. 686).

b The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.¹

c A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d Suits² shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.³

¹Since a pending suit can ordinarily have no other substantial effect, if prosecuted to a judgment, than to fix the amount of the bankrupt's indebtedness (*Norton v. Switzer*, 93 U. S. 355), if this is not disputed or the claim is not such as comes within the statute there can be no purpose served by the trustee appearing to defend, for he has his remedy in the bankruptcy court (*Trader's Bank v. Campbell*, 14 Wall. 87; s. c. 6 B. R. 353; 2 Biss. 423; 3 B. R. 498. See also §57 as to proof and allowance of claims). A trustee should always intervene, when necessary to protect rights of estate (*In re Kanavaugh* [D. C.], 99 Fed. Rep. 928), and where a suit is pending against the bankrupt in a State court by a judgment creditor and a receiver has been appointed in such case and has property of the bankrupt in his possession, then the trustee should intervene to protect the rights of the general creditors, and to enable him so to do, the bankruptcy court will restrain the proceedings in the State court for a reasonable length of time (*In re Klein* [D. C.], 97 Fed. Rep. 31). A creditor cannot institute an ejectment suit against a bankrupt or his representative in a State court after adjudication if the effect will injure the rights of the general creditors. He must seek redress in the bankruptcy court (*In re Chambers, Calder and Co.* [D. C.], 98 Fed. Rep. 865). Yet, if for any reason he does enter his appearance, he becomes subrogated to all the rights of the bankrupt and may take such action relative to the proceedings as he deems advisable (*Louden v. Blanford*, 56 Geo. 150; *Knox v. Bank*, 12 Wall. 379; *Sandford v. Sandford*, 58 N. Y. 67; *Home Ins. Co. v. Hollis*, 53 Geo. 659).

After a trustee enters his appearance, the cause will be continued in his name (*Ames v. Gilman*, 51 Mass. 239), and while the costs which have accrued previous to the entry of his appearance cannot be taxed against him, yet such as are made afterwards may be so taxed though he is not personally liable for them unless so ordered by the court on the ground of bad faith or mismanagement (*Norton v. Switzer*, 93 U. S. 355; *Reade v. Waterhouse*, 10 B. R. 277). Where a State court has, before the filing of the petition in bankruptcy, rendered a decree in a foreclosure proceeding, that court retains exclusive jurisdiction for the purpose of selling the encumbered property, though any balance from the sale belongs to the trustee to protect which he should apply to the State court to be made a party and ask to have such balance paid him (*In re Gerdes* [D. C.], 102 Fed. Rep. 318). In submitting himself to the jurisdiction of the State court, the trustee becomes bound by its action (*In re Van Alstyne* [D. C.], 100 Fed. Rep. 929).

²The word, suits, seems to include every form of action that may be brought in any court (*Bailey v. Weir*, 21 Wall. 342; *Union Canal Co. v. Woodside*, 11 Penn. 176; *Ames v. Gilman*, 51 Mass. 239; *Jenkins v. Bank*, 106 U. S. 571; *Walker v. Townner*, 4 Dill. 165; *Payson v. Coffin*, 4 Dill. 386).

³The right of Congress to enact such a limitation on suits has been upheld (*Peiper v. Harmer*, 5 B. R. 252), and it seems to supersede all other national and

SEC. 12. Compositions, when Confirmed.—*a* A bankrupt may offer terms of composition¹ to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.²

b An application for the confirmation³ of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

state enactments on that subject (*Freeland v. Gerson v. Holloman*, 9 B. R. 331). The limitation does not go to the jurisdiction of a court, and should be pleaded in bar (*Chemung Bank v. Judson*, 8 N. Y. 254). A trustee who is barred by the limitation cannot avoid the statute by assigning his claim, since the assignee can become vested with no rights which the assignor does not possess (*Cleveland v. Boerum*, 24 N. Y. 613).

¹Analogous provisions: R. S. §5103A. This section is in derogation of the common law, and all its provisions should be strictly construed (*In re Shields*, 15 B. R. 552). To be valid, the composition must be offered to all the creditors, and they are entitled to a reasonable opportunity to consider it (*In re Rider* [D. C.], 96 Fed. Rep. 808). If a copartnership is the bankrupt, it has been held that the application for a composition may be made by any one of its members, all being unnecessary (*Pool v. McDonald*, 15 B. R. 560). This holding is opposed to the general rule which regulates the authority of the individual members of a copartnership, and if necessity requires it to be made, it should at least be in the firm name, for it is extremely doubtful whether, under the present statute, the holding in *Pool v. McDonald* will be followed.

²As to examination and other duties of bankrupts, see §7 and notes. It is no defense to an involuntary petition that the petitioning creditors have agreed to compromise where the composition has not been paid (*Simonson v. Sinsheimer* [C. C. A.], 95 Fed. Rep. 948).

³Applications for the confirmation of a composition shall be heard and decided by the judge (Rule XII [3]), the opposing creditors being required to enter appear-

d The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors ;¹ (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge ;² and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.³

ance thereto on the day when the creditors are required to show cause, and file a specification in writing within ten days thereafter (Rule XXXII). This specification should be verified, but neglect to do so will be treated as a mere irregularity and may be cured by a verification *nunc pro tunc* (*In re Wolfstein* [D. C.], 1 N. B. News, 202).

¹A composition "for the best interest of creditors" should be construed as referring to the interests of the minority as well as the majority, otherwise the section would be open to constitutional objections in that it did not operate uniformly, a feature which must characterize all bankrupt provisions (*In re Silverman*, 4 B. R. 523; s. c. 1 Saw. 410; *in re Reiman & Friedlander*, 11 B. R. 21; s. c. 7 Ben. 445; 12 Blatch. 562; 13 B. R. 128; *Leidigh Carriage Co. v. Stengel* [C. C. A.], 1 N. B. News, 296, 387; s. c. 95 Fed. Rep. 637). The court will presume the action of the majority to be for the best interest of all the creditors unless that action is assailed (*In re Weber Furniture Co.*, 13 B. R. 359). The composition should not be confirmed unless it will pay each creditor as large a percentage of his claim as could be paid by an administration of the estate in the regular course of bankruptcy (*In re Whipple*, 11 B. R. 524; *in re Reiman & Friedlander*, *supra*; *in re Morris*, 11 B. R. 443; *in re Weber Furniture Co.*, *supra*; *in re Scott, Collins & Co.*, 15 B. R. 73). It has been said that the interest to be considered is that of creditors at the time of the acceptance of the composition (*In re Haskell*, 11 B. R. 164). This should be accepted only as a general rule. Each case should be considered upon its own facts, otherwise an avenue would be open for the rampage of fraud in all its disguises. The court should not rest its conclusion upon the action of the majority of the creditors, but should examine the composition. If it seems unreasonable or greatly disproportionate to the assets, it is the duty of the court to reject it, upon its own motion if necessary (*Ex p. Cowen*, L. R. 2 Ch. App. 563; *Dingwell v. Edwards*, 4 Best & S. 738; *Wells v. Hacon*, 5 Best & S. 196; *Richmond Hill Hotel Co.*, L. R. 4 Eq. 566; s. c. 3 Ch. App. 10; *Ex p. Nicholson*, L. R. 5 Ch. App. 332; *ex p. Radcliffe Investment Co.*, L. R. 17 Eq. 121; *ex p. Dingman*, L. R. 11 Eq. 604; *ex p. Birmingham Gas Light Co.*, L. R. 11 Eq. 204; *ex p. Levy & Co.*, L. R. 11 Eq. 619; *Bell v. Bird*, L. R. 6 Eq. 635).

²As to acts which will prevent a discharge, see §14b.

³Any fraud, misrepresentations, concealments, secret arrangements or understandings of any nature, or by any parties or interested persons, or others in his behalf, whereby one creditor gains an advantage over any other, or which induces a creditor to accept the composition or in any way injures a creditor, will justify the court in refusing to confirm it (*In re Sawyer*, 14 B. R. 241; s. c. 4 Cent. L. J. 470; *In re Whitney*, 14 B. R. 1; *Jackson v. Lomas*, 4 Term R. 166; *Leicester v. Rose*, 4 East 372; *Irving v. Humphrey*, Hopk. Ct. (N. Y.), 284; *Graham v. Meyer*, 99 N. Y. 611; *Whiteside v. Hyman*, 10 Hun. 218; *Coolong v. Noyes*, 6 T. R. 263; *Sewing v. Gale*, 28 Ind. 486; *Bean v. Amsink*, 8 B. R. 228; *Knight v. Hunt*, 5 Bing. 432; *Anshall v. Denby*, 6 Hurl & N. 788; *Bean v. Bookmier*, 7 B. R. 568; *Dexter v.*

e Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed.¹ Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

SEC. 13. Compositions, when set Aside.—*a* The judge may, upon the application of the parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.²

Snow, 66 Mass. 594). Very slight evidence will be required to impute to the debtor a fraud perpetrated by another when it inures to the benefit of the debtor (*In re Sawyer*, *supra*); but if a fraud exists and cannot be charged to the debtor, he may be given leave to make a new offer of composition on which the creditors may again act (*Ex p. Harrison*, 2 Buck. 247). The fact that a creditor has failed to get the notice required to be mailed to him under §58, will be no ground on which to set the composition aside (*In re Rudnick* [D. C.], 1 N. B. News, 276; s. c. 93 Fed. Rep. 787).

¹When the case is dismissed, on the confirmation of the composition, the title to the property re-vests in the bankrupt (§70f), and no further order to discharge him from his debts is necessary (*In re Becket*, 12 B. R. 201; s. c. 2 Woods, 173).

The general rule of law that a creditor who releases his principal debtor thereby discharges the surety is not followed in bankruptcy, the surety not being released by the composition of the principal with his creditors (*Mason & Hamilton Organ Co. v. Bancroft*, 1 Abb. N. C. 415; s. c. 4 Cent. L. J. 295; *ex p. Jacobs*, 44 L. J. B. 34; §16). If the consideration agreed upon in the composition is not paid in substantial accordance with the terms thereof the debts remain unaffected, and the debtor, or bankrupt, is liable for the full amount of the original claims (*In re Hurst*, 13 B. R. 455-465; *in re Reiman & Friedlander*, 11 B. R. 21; s. c. 13 B. R. 128; *Edwards v. Coombe*, 7 L. R. Com. Pleas Div. 519; *in re Hatton*, L. R. 7 Ch. App. 723; *Newall v. Van Prague*, 9 L. R. Com. Pleas Div. 96; *Goldney v. Lording*, L. R. 8 Q. B. 182; *Simonson v. Sinsheimer* [C. C. A.], 95 Fed. Rep. 948).

A discharge under a composition is a discharge by operation of law (*Ex p. Jacobs*, 44 L. J. B. 34), and may be pleaded as a defense to any action brought on a claim affected by it (*In re Tooker*, 14 B. R. 35. See also *McDonald v. Davis*, 105 N. Y. 508; *Dimock v. Revere Copper Co.*, 117 U. S. 559; s. c. 90 N. Y. 33). It has been held that the confirmation of the composition conclusively settles the fact that every requirement of the statute has been complied with (*Smith v. Engle*, 14 B. R. 481).

²For analogous provisions, see R. S. §5103A; for a revocation of a discharge, §15, and notes under the preceding section. When all the creditors of an insolvent agreed between themselves and with him, to take his property and divide it pro rata among them in full of their claims, some of such property being in the

SEC. 14. Discharges, when Granted.—*a* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.¹

hands of an assignee for the benefit of creditors, a composition made by them in such settlement will not afterwards be vitiated on some of the creditors dissenting therefrom and procuring an adjudication in bankruptcy against such insolvent for having made the general assignment referred to (*Botts v. Hammond et al.* [C. C. A.], 99 Fed. Rep. 916).

¹See Rule XII(3) as to applications for a discharge, approval of compositions, injunctions, etc.; Rule XXXI as to petition for discharge; Rule XXXII as to opposition to discharge; Rule XXXIV as to costs in contested adjudications; Rule XXXV(4) and §51(2) as to payment of filing fees. See also §5 as to partners; §16 as to co-debtors; §17 as to debts not affected by a discharge, and §38(4) relative to the referee's jurisdiction on applications for a discharge, together with the notes to these sections.

The application for a discharge can only be filed as a matter of right within the year following the adjudication, and the time will not be extended unless the application therefor is made within eighteen months after adjudication (*in re Wolff* [D. C.], 100 Fed. Rep. 430).

The question of discharge does not rest in discretion; it must be granted unless the applicant is guilty of one of the statutory offenses (*In re Marshall Paper Co.* [C. C. A.], 102 Fed. Rep. 872). He will be presumed to be so guilty as far as the question of a discharge is concerned, when the evidence shows a large unaccountable shrinkage of assets and a fraudulent failure to keep books (*In re Cashman* [D. C.], 103 Fed. Rep. 67). To warrant a refusal to discharge, it is not enough, when the ground of opposition is the making of a false oath, to show that the bankrupt omitted from his schedule property held in his wife's name. The evidence must not only show such property belonged to the bankrupt, but that he had a clear knowledge of that fact (*Fellows v. Frendenthal* [C. C. A.], 102 Fed. Rep. 731). If a bankrupt has made a colorable transfer of property, he should set the same out in his schedule of property; if he fails to do so, he will be guilty of concealing it (*In re Hoffman* [D. C.], 102 Fed. Rep. 979). If no objections are made, a discharge will be granted, for the court will not of its own motion, seek grounds for refusing it (*In re Hixon* [D. C.], 1 N. B. News, 326; s. c. 93 Fed. Rep. 440; *in re Holman* [D. C.], 92 Fed. Rep. 512; *in re Schuyler*, 2 B. R. 549; s. c. 3 Ben. 200; *in re Rosenfeldt*, 2 B. R. 117). It is no ground for refusing a discharge that the applicant is a minor, if he has been manumitted (*In re Brice* [D. C.], 1 N. B. News, 276, 310; s. c. 93 Fed. Rep. 942), or that the applicant had been refused a discharge under the Act of 1867 (*In re Herman* [D. C.], 102 Fed. Rep. 753). On the hearing of the application for discharge, the court will not pass upon the question as to whether a particular debt is excepted from its operation. That is no ground of opposition, it being a defense to the action if the debt is sued (*In re Rhutassel* [D. C.], 96 Fed. Rep. 597; *in re Peacock* [D. C.], 101 Fed. Rep. 560; *in re Marshall Paper Co.* [C. C. A.], 102 Fed. Rep. 872). Nor can the question

b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition

of domicile be raised as an objection to a discharge (*In re Mason* [D. C.], 99 Fed. Rep. 256; *in re Clisdell* [D. C.], 101 Fed. Rep. 246), though if this ground existed, the creditors may again examine the bankrupt (See §7[9]), and if the evidence on such examination warrants, move to vacate the adjudication. Any ground warranting a refusal to discharge that is disclosed on the bankrupt's examination must be proved on the issue of a discharge by evidence other than that of the record of the examination, for that is not admissible on such an issue (*In re Logan* [D. C.], 102 Fed. Rep. 876).

The specifications opposing a discharge may be filed by any creditor whose name is mentioned in the schedule, whether his claim is proved or not (*In re Price* [D. C.], 96 Fed. Rep. 611). Such specifications must be full, clear and distinct, and based upon the statutory grounds specified in the section under discussion (*In re Hixon* [D. C.], 1 N. B. News, 326; s. c. 93 Fed. Rep. 440; *in re Thomas* [D. C.], 1 N. B. News, 329; s. c. 92 Fed. Rep. 912; *In re Holman* [D. C.], 92 Fed. Rep. 512; *in re McGurn* [D. C.], 102 Fed. Rep. 743)—they must be as specific, definite and certain as a criminal complaint (*In re Hirsch* [D. C.], 96 Fed. Rep. 468; *in re Peacock* [D. C.], 101 Fed. Rep. 560; *in re Pierce* [D. C.], 103 Fed. Rep. 64), though it had been held, in one of the very earliest decisions under the Act, that the specifications are not subject to demurrer (*Anon* [D. C.], 1 N. B. News, 2). If the persons filing the specifications decline to produce proofs, other persons interested may do so (*In re Houghton*, 10 B. R. 337). When the objections raised to a discharge are overruled and a discharge ordered, the certificate thereof will not issue until the expiration of ten days after such order (*In re Hirsch* [D. C.], 96 Fed. Rep. 468).

Under the former Acts, it was held that where a member of a partnership filed an individual petition in which he asked for a discharge from all his provable debts, the same warranted a discharge from both individual and partnership liabilities (*In re Pierson*, 10 B. R. 107; *Wilkins v. Davis*, 15 B. R. 60; *in re Downing*, 3 B. R. 748; s. c. 1 Dill. 33; *in re Stevens*, 5 B. R. 112; s. c. 1 Saw. 397; *in re Frear*, 1 B. R. 660; *in re Grady*, 3 B. R. 227; *in re Abbe*, 2 B. R. 75; *in re Leland*, 5 B. R. 222; *West Phila. Bank v. Gerry*, 106 N. Y. 467). This rule met with opposition on the ground that partnership assets did not pass to the trustee (*Crompton v. Conkling*, 15 B. R. 417; *Trimble v. More*, 15 J. & S. [N. Y. Superior Ct.], 340; *in re Shepard*, 3 B. R. 172; *in re Noonan*, 10 B. R. 331). However forcible that objection might have been, it can hardly be tenable under the present Act, for ample provision is made to distribute among creditors every form of assets belonging to a bankrupt (See §§5, 70). Notwithstanding, it has been held under the present Act that when the partnership as such is not in bankruptcy, individual members are not entitled to a discharge affecting firm debts (*In re Meyers* [D. C.], 96 Fed. Rep. 408. See also *in re McFaun*, *subter*). It would be difficult to harmonize such a holding with the spirit of the present Act, for a rule so broad would result in denying the benefits of the Act to individual members of a firm when it would be impracticable to procure an adjudication as to the firm. The better, and no doubt true rule, is that first stated, that on an individual petition, one is entitled to a discharge of both individual and firm debts. Such a discharge will be granted under the present Act, but the petition should set forth the names of the partners and pray for a discharge from firm debts; the schedule should list both the petitioner's individual property and debts, and the property and debts of the firm; notices to the creditors should inform them that firm debts are affected and that a discharge from their debts is prayed; and notices of the filing of the petition and creditors' meetings should be sent to the other partners of the firm (*In re*

thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard,¹ and investigate the merits of the application, and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided;² or (2) with fraudulent intent to conceal his true

Laughlin [D. C.], 96 Fed. Rep. 589; *in re Hartman* [D. C.], 96 Fed. Rep. 593; *in re McFaun* [D. C.], 96 Fed. Rep. 592; *in re Russel* [D. C.], 97 Fed. Rep. 32).

When a firm is the bankrupt, the court may refuse it a discharge and grant a discharge to individuals of it, or vice versa (*In re George & Proctor*, 1 Lowell, 409; *in re Schofield*, 3 B. R. 551; *in re Downing*, 3 B. R. 748; *Chemical Nat. Bank v. Meyer* [D. C.], 1 N. B. News, 304; s. c. 92 Fed. Rep. 896). In view of this, the partnership petition for a discharge should incorporate a prayer for the individual discharge of the members composing the firm. The omission of such a prayer, however, is not fatal, since any individual member is entitled to file an individual application for a separate discharge the same as though an individual petition for adjudication had been filed (*In re Meyers* [D. C.], 97 Fed. Rep. 757).

When an issue on a discharge is referred to a referee to take testimony, his record should show the proceedings (*Mahoney v. Ward* [D. C.], 100 Fed. Rep. 278), and he should not only report the evidence and his rulings, but also findings and recommendations (*In re Kaiser* [D. C.], 99 Fed. Rep. 289), though he has no authority to grant a discharge (*Anon* [D. C.], 1 N. B. News, 2; *in re McDuff* [C. C. A.], 101 Fed. Rep. 241). A discharge will not relieve a bankrupt from the payment of a fine imposed by a court of law (*In re O'Donnell* [D. C.], 1 N. B. News, 59), nor will it affect a lien acquired more than four months before the petition was filed (*In re Blumberg* [D. C.], 1 N. B. News, 258; s. c. 94 Fed. Rep. 476). To get the benefit of it, the discharged bankrupt must appear and plead it (*In re Wesson* [D. C.], 88 Fed. Rep. 855; *in re Rhutassel* [D. C.], 96 Fed. Rep. 597; *in re Peacock* [D. C.], 101 Fed. Rep. 560; *in re Marshall Paper Co.* [C. C. A.], 102 Fed. Rep. 872), the last case holding that a limited judgment might be taken against him in order to enforce a secondary liability.

¹This hearing can only be had before the judge (§38[4]), the referee not having power to grant discharges (Ruling by Judge Thompson: *Anon*, *supra*; *in re McDuff*, *supra*. See also §38 as to the jurisdiction of referees). The referee may issue the order fixing the time for the hearing (§38; *in re Gettleston*, 1 B. R. 604; *in re Bellamy*, 1 B. R. 96; s. c. 1 Ben. 426), and give the notice required (§58). The creditors are entitled to a notice in writing, mailed to them ten days before the hearing (§58[2]), sent to such address as they may desire (Rule XXI), and to such other notice as the court shall direct (§58b; §28). The right to appear at the hearing and object to the discharge is not limited to the creditors, but anyone having an interest may do so (*In re Sheppard*, 1 B. R. 439), even though the claim of the creditor so objecting be not yet proven (*In re Book*, 3 McLean, 317), whether it is contingent and unliquidated, or whether it is simply an interest in the surplus moneys and not against the bankrupt at all (*In re Traphagan*, 1 N. Y. Leg. Obs. 98).

²The applicant only can be the bankrupt, or if a partnership, a member of it, and the offenses of which he may be guilty so far as his own estate is concerned and which are expressly punishable by imprisonment, are (a) knowingly and fraudulently concealing from his trustee property belonging to his estate, (b) making a false oath or account in relation to the proceedings in bankruptcy, or (c) extorting or attempting to extort money or property as a consideration for acting or forbearing to act in bankruptcy proceedings (§29b [1, 2, 5]). These are the

financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.¹

only grounds, under this subdivision of the paragraph, which will authorize the court to refuse a discharge. It has been held, however, that a false oath made in the examination provided for in §7(9) is no ground for refusing a discharge as the testimony so given could not be used to convict him of the offense (*In re Marx et al.* [D. C.], 102 Fed. Rep. 676). The court may also punish by imprisonment one who is guilty of any other violation of the act (§2[4, 13]), or who shall be adjudged guilty of contempt before referees (§2 [13, 16], §41). The intention of Congress, however, was not to make the bankrupt's failure to perform the duties set out in §7, or the offenses punishable as contempts, grounds for a refusal to discharge. These were made grounds in the original draft of the bill that became the present law, but were stricken out before its passage as a concession to the opposition.

It has been held that the concealment must be actual and not constructive (*Silverman v. Bagley*, 3 Mass. 487), but this should be interpreted as embracing any fictitious or colorable alienation of property for the purpose of misleading as to the real ownership, or as to interests therein belonging to the bankrupt (*In re Williams*, 3 B. R. 286; s. c. 1 Lowell, 406; *O'Neill v. Glover*, 5 Gray, 144; *in re Hussman*, 2 B. R. 437; *in re Welch* [D. C.], 100 Fed. Rep. 65; *in re Quackenbush* [D. C.], 102 Fed. Rep. 282; *in re Hoffman* [D. C.], 102 Fed. Rep. 979). It will be a concealment within the meaning of this act to omit from the schedule of assets certain of his property, especially where the bankrupt testified falsely as to the ownership of his business (*In re Lowenstein* [D. C.], 1 N. B. News, 329), or when property which is shown to have been in his possession some months before his bankruptcy disappears without a reasonable explanation (*In re Finkelstein* [D. C.], 101 Fed. Rep. 418). This is especially true when the bankrupt's books of account which were in his possession at the time of bankruptcy have been intentionally suppressed or mutilated (*In re Mendelsohn* [D. C.], 102 Fed. Rep. 219), or as to assets which vest in the trustee (*In re Roy* [D. C.], 96 Fed. Rep. 400). A bankrupt, however, will not be considered as making a false oath in swearing to a schedule from which assets are omitted through mistake or inadvertence, the same being, therefore, no ground for refusing a discharge (*In re Crenshaw* [D. C.], 95 Fed. Rep. 632; *in re Roy* [D. C.], 96 F. R. 400; *in re Hirsch* [D. C.], 96 Fed. Rep. 468), or having listed all his property in his schedules, affixed thereto a valuation placed thereon by appraisers several years before, though such value be much below its present market value (*In re McBryde* [D. C.], 99 Fed. Rep. 686), nor in making an affidavit that he cannot obtain the sum required for filing fees, though friends would have advanced the amount if requested, he not being required to solicit loans for that purpose, to pay it out of his exemptions, or out of money earned after filing his petition (*Sellers v. Bell* [C. C. A.], 94 Fed. Rep. 801). Neither is the fact that a debt was created by fraud or false representations a ground for opposing a discharge (*In re Black* [D. C.], 97 Fed. Rep. 493; *in re Peacock* [D. C.], 101 Fed. Rep. 560), the scope of the discharge being a matter for after consideration if questions relative to it arise (*In re Mussey* [D. C.], 99 Fed. Rep. 71).

¹The fraudulent intent and contemplation of bankruptcy must both be proved (*In re Marston*, 5 Ben. 313), for they are questions of fact which the courts will not infer. (See notes to §3 a and b.) The "contemplation of bankruptcy," as used in this section means an intention to become a voluntary bankrupt, or the doing of an act enabling creditors to obtain an involuntary adjudication in accordance

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.¹

SEC. 15. Discharges, when Revoked.—a The judge may, upon the application of parties in interest who have not been guilty of undue laches,² filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the

with the provisions of a law in existence at the time of the "contemplation" (*In re Carmichael* [D. C.], 96 Fed. Rep. 594; *in re Hirsch* [D. C.], 96 Fed. Rep. 468).

Books need not be kept in any particular form; memoranda, receipts, etc., showing payments, assets and liabilities, as well as stock on hand seem to be sufficient (*In re Mackay*, 4 B. R. 66; *in re Solomon*, 2 B. R. 285; *in re Newman*, 2 B. R. 302; s. c. 3 Ben. 20; *in re Bellis & Milligan*, 3 B. R. 496; s. c. 4 Ben. 53; *in re Holtz* [D. C.], 1 N. B. News, 204). The creditors who oppose a discharge for failure to keep books, must prove that the failure was "with fraudulent intent to conceal his [bankrupt's] true financial condition" (*In re Schertzer* [D. C.], 99 Fed. Rep. 706). The failure to keep books of account regarding property bought with money obtained by surrendering policies of life insurance payable to his wife, is no ground for refusing the bankrupt's discharge, for the reason that such property belongs to his wife (*In re Dewa* [D. C.], 1 N. B. News, 411). Neither is the destruction or concealment of books, or failure to keep them prior to the passage of the act, grounds of opposition (*In re Shorer* [D. C.], 1 N. B. News, 331; *in re Cohn* [D. C.], 1 N. B. News, 330; *in re Holman* [D. C.], 92 Fed. Rep. 512; *in re Shorer* [D. C.], 96 Fed. Rep. 90; *in re Stark* [D. C.], 96 Fed. Rep. 88, 90; *in re Hirsch* [D. C.], 96 Fed. Rep. 468), or a failure to keep them properly subsequently thereto, if the evidence does not show his failure to be with a fraudulent intent to conceal his financial condition in contemplation of bankruptcy (*In re Brice* [D. C.], 102 Fed. Rep. 114). In all cases, the party opposing a discharge has the burden of proving or establishing the grounds of opposition set out in his specifications (*In re Hirsch* [D. C.], 97 Fed. Rep. 571; *in re Phillips et al.* [D. C.], 98 Fed. Rep. 844). The form of a discharge should be made to cover the individual or firm liabilities, or both if a firm is in bankruptcy (*In re Gay et al.* [D. C.], 98 Fed. Rep. 870), without any reservation relative to debts which may not be affected by the discharge, the scope of the discharge to be determined in the future when the question relative to such debts arises (*In re Mussey* [D. C.], 99 Fed. Rep. 71).

¹See §12 and notes as to confirmation of compositions.

²Laches has been defined "as such neglect or omission to assert a right, as taken in conjunction with lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." As no one is ever required by law or equity to do the impossible, it follows that before one can be charged with laches, he must have neglected to assert his right after he had knowledge of it. He must do so, however, within the year. If he does not do so, he will then be barred, not by laches, but by the statutory limitation. For a full discussion of the subject of laches, see 12 Am. & Eng. Ency. of Law, 533-550. Also *in re Buchstein*, 17 B. R. 1; *U. S. Bank v. Cooper*, 20 Wall. 171; *Littlefield v. Delaware & Hudson Canal Co.*, 4 B. R. 257.

knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.¹

SEC. 16. Co-Debtors of Bankrupts.—*a* The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.²

¹The Court of Bankruptcy has exclusive jurisdiction to revoke a discharge regular on its face (*Corey v. Ripley*, 4 B. R. 503; s. c. 57 Me. 69; *Dudley v. Mayhew*, 3 N. Y. 10; *Stevens v. Evans*, 2 Barr. 1157; *Beston v. Shaw*, 1 Met. 130; *Com. Bank of Manchester v. Buckner*, 20 How. 108; *Stetson v. Bangor*, 56 Me. 286; *Sturgis v. Crownshield*, 4 Wheat. 122), and that jurisdiction can be exercised only on applications filed within the period of limitation fixed by the statute—one year after the discharge (*Corey v. Ripley*, 4 B. R. 503; *Way v. Howe*, 4 B. R. 677; s. c. 108 Mass. 502; *Hudson v. Bingham*, 8 B. R. 494; s. c. 12 A. L. Reg. 637; *Altson v. Robinett*, 9 B. R. 74; s. c. 37 Tex. 56; *Reed v. Bullington*, 11 B. R. 408; s. c. 49 Miss. 223; *Stevens v. Brown*, 11 B. R. 568; s. c. 49 Miss. 597; *Smith v. Ramsey*, 15 B. R. 447; s. c. 27 Ohio St. 339; *Symonds v. Barnes*, 6 B. R. 377; s. c. 59 Me. 191; *Burper v. Sparhawk*, 4 B. R. 685; s. c. 108 Mass. 111; *Payne v. Able*, 4 B. R. 220; s. c. 7 Bush [Ky.], 344; *Black v. Blaso*, 13 B. R. 195; s. c. 117 Mass. 17; *Bank v. Olcott*, 46 N. Y. 12; *Parker v. Atwood*, 52 N. H. 181; *Oates v. Parrish*, 47 Ala. 157; *Seymour v. Street*, 5 Neb. 85; *Stern v. Nussbaum*, 5 Daly [N. Y.], 382; *in re Archenbrow*, 11 B. R. 149; *Pickett v. McGavitt*, 14 B. R. 236; *Commercial Bank of Manchester v. Buckner*, 20 How. 108). When the petition shows that the bankrupt concealed assets, swearing falsely to his schedules, it establishes a *prima facie* case and will be referred to the referee to take proofs, upon due notice to the bankrupt (*In re Meyers* [D. C.], 100 Fed. Rep. 775).

²A discharge is a personal release and it cannot be pleaded as a defense by one to whom the bankrupt has fraudulently conveyed property so as to defeat a judgment creditor's suit against him and the bankrupt, when the latter fails to appear and plead his discharge (*Moyer v. Dewey*, 103 U. S. 301). The surety on a bail bond, however, is at liberty to plead the discharge within the time he is entitled to surrender the principal (*Richardson v. McIntyre*, 4 Wash. C. C. 412; *Kane v. Ingraham*, 2 Johns. Cas. 403; *Hayton v. Wilkinson*, 1 Hall's Am. L. J. 260; *Olcott v. Lilly*, 4 Johns. 407; *Thorne v. Brown*, 9 Watts, 288). This is on the theory that the liability has not become fixed by the happening of the contingency specified in the bond; and when that is true of other bonds, the same rule will undoubtedly be applied (*Wolf v. Stix*, 99 U. S. 1; *Carpenter v. Terrill*, 100 Mass. 450; *Hamilton v. Bryant*, 14 B. R. 479; s. c. 114 Mass. 543; *Braley v. Boomer*, 12 B. R. 303; s. c. 116 Mass. 527; *Johnson v. Collins*, 12 B. R. 70; s. c. 117 Mass. 343; *Odell v. Wootten*, 4 B. R. 183; s. c. 38 Geo. 225), though if the bond is in the nature of a substituted security, such as a bond given to dissolve an attachment, or a replevin bond, it has been said that the court will not permit the surety to plead the bankrupt's discharge, but will proceed to judgment for the purpose of holding the surety (*In re Marshall Paper Co.* [C. C. A.], 102 Fed. Rep. 872; *Holyoke v. Adams*, 10 B. R. 270; s. c. 1 Hun. [N. Y.], 223; [affirmed] 59 N. Y. 233; *McCombs v. Allen*, 18 Hun. 190; [affirmed] 82 N. Y. 114; *Bond v. Gardner*, 4 Binn. 269; *in re Albrecht*, 17 B. R. 287; *Hill v. Harding*, 107 U. S. 631). The same is also the rule as to appeal bonds where the appellate court admits supplemental pleading; but where that court will not entertain such pleadings, and no matter outside the

SEC. 17. Debts not Affected by a Discharge.—A discharge in bankruptcy shall release a bankrupt from all of his provable debts,¹ except such as (1) are due as a tax levied by the United States, the state, county, district or

record made in the lower court will be considered by it, then the surety will be liable on the appeal bond (*Knapp v. Anderson*, 15 B. R. 316; s. c. 7 Hun. 295; [affirmed] 71 N. Y. 466; *Cornell v. Dakin*, 38 N. Y. 253; *Poppenhausen v. Seeley*, 3 Abb. Ct. of App. Dec. 615; *Hall v. Fowler*, 6 Hill [N. Y.], 630; *Flagg v. Tyler*, 6 Mass. 33; *Burr v. Carr*, 7 Bing. 508; *Southcote v. Braithwaite*, 1 T. R. 624). A creditor, it has been said, is under no obligation to appear in a bankruptcy proceeding and object to a discharge in order to save his rights against a surety, even though the surety request him to do so (*Ex p. Jacobs*, 44 L. J. B. 34; *Mason & Hamlin v. Bancroft*, 1 Abb. N. C. 415; s. c. 4 Cent. L. J. 295); yet, as to that, the authorities are not agreed (*In re McDonald*, 14 B. R. 477). Nor is he obliged to make himself a party to prove his claim and collect what he can from the estate (*Clapton v. Spratt*, 52 Miss. 251), for the surety has it within his own power to protect himself (§571).

A joint debtor who has been discharged in bankruptcy is a necessary party to any proceedings to enforce a joint obligation (*Jenks v. Opp*, 12 B. R. 19; s. c. 43 Ind. 108; *Camp v. Gifford*, 7 Hill 169; *in re Marshall Paper Co.* [C. C. A.], 102 Fed. Rep. 872). A surety who has been released from a joint obligation cannot be required to contribute to other co-sureties who have paid the obligation (*Tobias v. Rogers*, 13 N. Y. 59. *Contra: Miller v. Gillepsie*, 59 Mo. 220).

¹As to what debts may be proved, see §63. Courts, other than those of bankruptcy, do not take judicial notice of a discharge. It must be pleaded as a defense, otherwise it will be considered waived and a valid judgment may be entered (*Jenks v. Opp*, 12 B. R. 19; s. c. 43 Ind. 108; *Horner v. Spellman*, 78 Ill. 206, 410; *McDonald v. Davis*, 105 N. Y. 508; *Revere v. Dimock*, 90 N. Y. 33; s. c. [affirmed] 117 U. S. 559; *Monroe v. Upton*, 50 N. Y. 593; *Manwarring v. Kouns*, 35 Tex. 171; *Stewart v. Green*, 11 Paige, 535; *Wolf v. Stix*, 99 U. S. 1; *Graham v. Pierson*, 6 Hill 24; *in re Wesson*, 88 Fed. Rep. 855).

Whenever advantage is sought to be taken of a discharge as a defense, it should be set up either in the original or supplemental pleadings rather than by motion (*Fellows v. Hall*, 3 MacLean 281), and the plaintiff will be at liberty to reply thereto, setting up the fact that the debt was not released as it came within an exception, particularly specifying the exception (*Cutter v. Folsom*, 17 N. H. 139). If a case be in a situation, or the practice of the court be such that a discharge cannot be pleaded before the entry of judgment, an application may be made for a perpetual stay of execution (*Cornell v. Dakin*, 38 N. Y. 253; *Palmer v. Hutchins*, 1 Cow. 42; *Baker v. Taylor*, 1 Cow. 165; *Revere v. Dimock*, 90 N. Y. 33; *Monroe v. Upton*, 50 N. Y. 593; *Graham v. Pierson*, 6 Hill 247). A practice which would serve the same purpose and be much less annoying and expensive, would be to open the judgment on motion after notice to the adverse party to admit the plea of discharge. This practice could be followed in all courts of record having original jurisdiction. (See *Shurtleff v. Thompson*, 12 B. R. 524; s. c. 63 Me. 118; *Manwarring v. Kouns*, 35 Tex. 171; *Bellamy v. Woodson*, 4 Geo. 175; *M. L. Ins. Co. v. Cameron*, 1 Abb. N. C. 424; *Humble v. Carson*, 6 B. R. 84).

A discharged debt may be revived by a definite promise to pay (*Stern v. Nussbaum*, 5 Daly [N. Y.] 382; s. c. 47 Howard Pr. 489; *Allen v. Ferguson*, 9 B. R. 481; s. c. 18 Wall. 1; *Harris v. Peck*, 1 R. I. 262; *Craig v. Seits*, 63 Mich. 727; *Evans v. Carey*, 29 Ala. 99; *Horner v. Speed*, 2 Pat. & H. 616), made at any time after the filing of the petition (*Jersey City Ins. Co. v. Archer*, 122 N. Y., and cases there

municipality in which he resides ;¹ (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another ;² (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy ;³ or (4) were created by his fraud, embez-

cited; *in re Montgomery*, 3 B. R. 426), the moral obligation to pay being a sufficient consideration to sustain it (*Dusenbury v. Hoyt*, 10 B. R. 313; s. c. 53 N. Y. 521; 14 Abb. Pr. [N. S.] 132; *Gardner v. Bowen*, 23 Weekly Digest 252). Unless the State law requires it, the promise need not be in writing (*Henley v. Lanier*, 10 B. R. 280; s. c. 75 N. C. 172; *Apperson v. Stewart*, 27 Ark. 619; *Fraley v. Kelly*, 67 N. C. 78; *Hernthal v. McRea*, 57 N. C. 21; *Kingsley v. Cousins*, 47 Me. 91). The promise will not be inferred, however, from such acts and statements as would avoid a statute of limitations. Not even the payment of interest on the discharged debt, or the payment of a portion of the principal, will be sufficient in itself to revive it (*Allen v. Ferguson*, 9 B. R. 481; s. c. 18 Wall. 1; *Lawrence v. Harrington*, 122 N. Y. 408; *Wheeler v. Simmons*, 60 Hun. 404; s. c. 39 N. Y. St. Rep. 797; *Cambridge Inst. v. Littlefield*, 60 Mass. 210). There must be a clear intention to revive the debt, and the best and perhaps the only safe way is to have that intention expressed in writing—in a promissory note or some other obligation.

¹These debts have priority, and need not be proved as other debts, the court determining all questions that may arise regarding the amount or legality (§64).

²The fraud upon which the judgment is founded must be actual and not constructive (*Neal v. Clark*, 95 U. S. 704; s. c. *sub nom.* *Neal v. Scruggs*, 17 B. R. 102), and it must have existed at the inception of the debt (*Brown v. Broach*, 52 Miss. 536; *in re Roy*, 13 B. R. 235; s. c. 1 Woods, 42; *Forsyth v. Vehmeyer* [U. S. Sup. Ct.], 20 Sup. Ct. Reporter, 623).

The judgment excepted by this subdivision, or the record on which it is based, must show that the action from which it springs was for the causes specified, and if it does not so appear, the judgment will not come within the exception. (See *in re Patterson*, 1 B. R. 307; *in re Whitehouse*, 1 Lowell, 429; *Warner v. Cronkhite*, 13 B. R. 52; s. c. 6 Biss. 453). It should be remembered that this exception relates only to judgment debts as distinguished from debts not reduced to judgments. The question as to whether a judgment sought to be enforced against a discharged bankrupt was rendered for fraud will be determined by the court from the record, which is conclusive, it is said in *Forsyth v. Vehmeyer* [Ill.], 1 N. B. News, 141. In *Parker v. Whittier* [C. C. A.], 1 N. B. News, 240; s. c. 91 Fed. Rep. 511, however, it was held that the cause of action did not become merged in a judgment thereon so as to preclude the plaintiff from showing that the original debt was created by the fraud of the debtor.

A judgment in an action for fraud does not include a claim by sureties on a replevin bond against their principals where the judgment went against the principals on the ground of fraud, and on failure of the principal to pay such judgment, the sureties must do so (*In re Blumberg* [D. C.], 1 N. B. News, 258; s. c. 94 Fed. Rep. 476).

³Under the Act of 1867, proceedings in bankruptcy had the nature of proceedings *in rem*, and if the court once gained jurisdiction of the bankrupt and the subject-matter, its decrees were binding on all creditors whether their claims were

zlement, misappropriation, or defalcation, while acting as an officer or in any fiduciary capacity.¹

included in or omitted from the schedule, and irrespective of the notice or actual knowledge here specified (*Rayl v. Lapham*, 27 Ohio St. 452; *Thurmond v. Andrews*, 13 B. R. 157; s. c. 10 Bush, 400; *Platt v. Parker*, 13 B. R. 14; s. c. 11 N. Y. Supreme 135; s. c. 6 N. Y. Supr. 377; *Lamb v. Brown*, 12 B. R. 522; s. c. 7 C. L. N. 363; *Black v. Blaso*, 117 Mass. 17; s. c. 13 B. R. 195). But whether the same will be true under the present statute, which expressly provides that they shall not be affected unless the creditor has notice or actual knowledge, depends upon the construction the courts will place upon "notice." As used in this section, it would seem that an actual notice was contemplated; but as employed in §58, it appears that a constructive one will answer the requirement. The word has been construed with reference to discharges on compositions, and it has been held that the failure of a creditor to get the notice was no ground for setting aside a composition (*in re Rudnick Bros.* [D. C.], 1 N. B. News, 276; s. c. 93 Fed. Rep. 787). That is a substantial holding that a constructive notice is sufficient, and it follows that the provable and dischargable debts will be released whether included in or omitted from the schedule, if the notices are given as provided for in §58.

¹It should be particularly noticed that the debts unaffected by a discharge under this subdivision are not simply such as spring from fraud, embezzlement, misappropriation or defalcation, but such as arise from these causes while the bankrupt has been acting as an officer or in a fiduciary capacity. The fraud contemplated in the second subdivision is independent of the relation between the bankrupt and the creditor; though it must be an actual and not a constructive fraud (*Neal v. Clark*, 95 U. S. 704; s. c. 17 B. R. 102). If property comes into one's possession lawfully to be held as collateral and is converted, such conversion will not amount to a fraud within the meaning of this provision of the bankrupt law (*Hennequin v. Clews*, 111 U. S. 676; s. c. 77 N. Y. 427; 84 N. Y. 676). Nor will the failure of a factor to account or remit for goods left with him to be sold on commission (*Chapman v. Forsyth*, 2 How. 202; *in re Basch* [D. C.], 97 Fed. Rep. 761), or the failure of commission men, collection agents, auctioneers or persons handling money or property for others under contract arrangements (*Hayman v. Pond*, 7 Met. 328; *Anstill v. Crawford*, 7 Ala. 333; *Com. Bank v. Buckner*, 2 La. Ann. 1023). This rule is founded upon the conclusion that the relations between the parties rested entirely in contract, the breach of which was to be considered one of contract rather than one of trust (*Chapman v. Forsyth*, *supra*).

CHAPTER IV.

COURTS AND PROCEDURE THEREIN.

SEC. 18. Process, Pleadings and Adjudications.—

a Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time;¹ but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States.²

¹As to the issuance of process, summons and subpoenas, see Rule III; as to the filing of petitions against the same person in different districts, Rule VI; as to amendments, Rule XI; as to duties of Referee, Rule XII; and as to general provisions, Rule XXXVII.

Under the U. S. equity practice, a suit is deemed to be *pending* after the same has been entered upon the docket on the return of the subpoena as served (Eq. Rule XVI), though a suit in bankruptcy will unquestionably be deemed commenced and pending when the petition is filed (§67*c*), rather than when the mesne process, subpoena, is issued (*In re Lewis* [D. C.], 91 Fed. Rep. 632. See also §31 as to computation of time). In view of the equity rules now in force, the clerk shall issue a subpoena (Eq. Rules VII, XII) returnable within fifteen days from the issuance thereof, unless the judge shall for cause extend the number of days, a copy of which, together with a copy of the petition, shall be served upon the defendant, the person against whom the petition is filed. This service shall be made by the marshal of the district, his deputy or some other person specially appointed by the court for that purpose (Eq. Rule XV), who shall serve such copies by delivering the same to the defendant personally, or by leaving them at the dwelling house or usual place of abode of the defendant, with some adult person, who is a member of or resident in the family (Eq. Rule XIII).

²If the defendant cannot be found within the district so as to make personal service of the subpoena upon him, or he shall not voluntarily appear, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the petition at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found; or where such personal service is not practicable, such order shall be published in such manner as the court shall direct. If the defendant does not appear and comply therewith upon proof of service or publication of the order, the court may

b The bankrupt, or any creditor may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow.¹

entertain jurisdiction the same as though the defendant had been served with process within the district, and proceed to a hearing and adjudication of the petition; but such adjudication shall only affect the property of the absent defendant within the district (Act of June 1, 1872, §13). The order must be published within the county and district where the defendant resides or where the major part of his property is situated, the court to designate the newspaper (§28).

¹The plea may embody both an answer and demurrer (*Orem v. Harley*, 3 B. R. 263; *in re Nickodemus*, 3 B. R. 230), but if it be the latter only, and it is overruled, an absolute adjudication of bankruptcy may be entered (*In re Benham*, 8 B. R. 94). If the petition should not be sufficiently verified, objection should be taken to it before a plea and answer on the merits, otherwise it will be waived, and this, too, though the court does not permit the answer to be filed (*Simonson v. Sinsheimer* [C. C. A.], 95 Fed. Rep. 948). The time allowed for pleading cannot be shortened by a written admission of insolvency. The subpoena must be issued and no reference can be made until such time has expired (*In re L. Humbert Co.* [D. C.], 100 Fed. Rep. 439). It has been held, however, that where process and time to plead were waived by defendant, an adjudication forthwith made would not be set aside upon the application of a stranger when neither the bankrupt nor any of his creditors object to the decree (*In re Columbia Real Estate Co.* [D. C.], 101 Fed. Rep. 965). If the allegations in the petition are uncertain or indefinite, the court, on motion, may dismiss the petition, or order a more definite one to be filed (*In re Melick*, 4 B. R. 97; *in re Randall & Sunderland*, 1 Deady, 557; s. c. 3 B. R. 18). Any one creditor appearing to oppose the adjudication, may interpose any plea or defense available to the debtor (*In re Cornwall*, 9 Blatch. 114; s. c. 6 B. R. 305; *in re Ouimette*, 3 B. R. 566; s. c. 1 Saw. 47; *in re Scrafford*, 14 B. R. 184). The jurisdiction of the court may be questioned (*In re Williams*, 14 B. R. 132) as in any proceeding at law or in equity, and the party opposing may introduce set-offs or payments made since the filing of the petition, for the purpose of showing that the defendant does not owe debts to the amount of one thousand dollars as provided in section four, or that the petitioning creditors have not provable claims in excess of the value of securities held by them, aggregating five hundred dollars as provided in section fifty-nine (*In re Cornwall*, *supra*; *in re Shelley*, 5 B. R. 214; s. c. 3 Biss. 260; *in re Ouimette*, *supra*; *in re Osage R. R. Co.*, 9 B. R. 281. See also *in re Tierre* [D. C.], 95 Fed. Rep. 425; s. c. 1 N. B. News, 402; *in re Folb* [D. C.], 1 N. B. News, 134; s. c. 91 Fed. Rep. 107; *in re Curtis et al.* [C. C. A.], 1 N. B. News, 357; s. c. 94 Fed. Rep. 630; s. c. [D. C.], 91 Fed. Rep. 737; *in re Mills* [D. C.], 95 Fed. Rep. 269; *Simonson v. Sinsheimer* [C. C. A.], 95 Fed. Rep. 948; *in re Romanow* [D. C.], 92 Fed. Rep. 510; *in re Beddingfield* [D. C.], 1 N. B. News, 385; s. c. 96 Fed. Rep. 190; *in re Schwartz* [D. C.], 1 N. B. News, 266; *in re Mercur* [D. C.], 95 Fed. Rep. 634; and §46 and notes thereto). If this were established, it would be the duty of the court to dismiss the proceedings for want of jurisdiction without inquiring into the questions of solvency or acts of bankruptcy specified in section three. It has been said that a tender of payment of the petitioners' debt is no defense (*In re Williams & Co.*, 1 Lowell, 406; s. c. 3 B. R. 286; *in re Ouimette*, *supra*). This is based on the supposition that insolvency exists because of which a payment in accordance with the tender would amount to a preference. The sufficiency of an answer to a petition in bankruptcy cannot be raised by a demurrer, that question being tested under the U. S. equity practice by setting the case down for a hearing upon the bill and answer (*Goldman, Beckman & Co. v. Smith* [D. C.], 1 N. B. News, 160; s. c. 93 Fed. Rep. 182,

c All pleadings setting up matters of fact shall be verified under oath.¹

d If the bankrupt, or any of his creditors shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury,² except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition.

e If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.³

f If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.⁴

and cases there cited). Creditors, however, are not entitled to file an answer to a voluntary petition (*In re Richard* [D. C.], 94 Fed. Rep. 633).

¹Verification may not be made by attorney unless the facts are within his own knowledge; it is not jurisdictional, and is waived unless objected to before a plea and answer on the merits (*In re McNaughton*, 8 B. R. 44; *in re Simmons*, 10 B. R. 253; *in re Sargent*, 13 B. R. 144; *Simonson v. Sinsheimer* [C. C. A.], 95 Fed. Rep. 948; *Leidigh Carriage Co. v. Stengel* [C. C. A.], 1 N. B. News, 296; s. c. 95 Fed. Rep. 637).

²As to jury trials, see § 19. "The right of a trial by jury in bankruptcy proceedings is limited to the question of insolvency of the defendant" (*Simonson v. Sinsheimer et al.* [C. C. A.], 100 Fed. Rep. 426, 429).

³A failure to appear and oppose within the time limited is a default within the inherent authority of the court to vacate (*In re Dupree*, 6 B. R. 89, and cases cited; *Thomas v. Hunter*, 3 McLean, 297). See U. S. Equity Rules XVIII and XIX as to defaults.

An adjudication is conclusive as to all persons not parties, and it will not be vacated on the petition of a stranger (*In re Columbia Real Estate Co.* [D. C.], 101 Fed. Rep. 965).

⁴The clerk can only refer an involuntary petition in cases where no issue is made by the bankrupt or creditors upon the facts set out in the petition (*In re L. Humbert Co.* [D. C.], 100 Fed. Rep. 439).

g Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.¹

SEC. 19. **Jury Trials.**—*a* A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.²

b If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sit-

¹The referee cannot make the adjudication in a case referred to him under the foregoing paragraph where partners of a firm not joining in the petition contest the adjudication of the firm; he must certify the case to the Judge for determination (*In re Murray* [D. C.], 96 Fed. Rep. 600). On an adjudication of a petition of a member of a copartnership praying a discharge from individual and firm debts, firm creditors may prove their claims against the estate of the individual under §54 (*In re Laughlin* [D. C.], 96 Fed. Rep. 589). See §2(18) touching taxation of costs, §5 as to partners, §14 as to discharges and §17 as to debts not affected by a discharge, together with the notes to these sections.

²All issues of fact presented by the pleadings in an involuntary case are to be determined by the Judge, except when a jury trial is given by this act (§18*d*). The cases in which such a trial is given are contained in this paragraph. It is given (1) in respect to questions of insolvency and (2) any act of bankruptcy alleged in the petition. The language of the paragraph is so clear that it would seem very difficult to misinterpret. Yet, the circuit court of appeals for the 6th circuit says: "The right of a trial by jury in bankruptcy proceedings is limited to the question of insolvency of the defendant" (*Simonson v. Sinsheimer et al.*, 100 Fed. Rep. 426). Had Congress intended trial by jury to be so limited, it certainly would have omitted the language, "and any act of bankruptcy alleged in such petition to have been committed." Aside from the cases specified in this section, the court may allow jury trials on other questions, in its discretion, the proceedings in bankruptcy being equitable in character (*In re Rude* [D. C.], 101 Fed. Rep. 805).

ting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

c The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.¹

SEC. 20. **Oaths, Affirmations.**—a Oaths required by this act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.²

¹Unless a bankruptcy act contains provision to the contrary, which the present does not, any party is entitled to have an issue of fact tried by a jury (R. S. §§566, 648, 649). This is the provision of the law-making branch of the government. The law-construing branch, however, evinces a disposition to limit the right of jury trials to questions that must be proved in establishing acts of bankruptcy (*Simonson v. Sinsheimer et al.* [C. C. A.], 100 Fed. Rep. 426, 429), allowing it as discretionary when other questions are at issue (*In re Rude* [D. C.], 101 Fed. Rep. 805), and denying it in questions of contempt (*Ripon Knitting Works et al. v. Schreiber* [D. C.], 101 Fed. Rep. 810). In none of these cases, however, did adverse claims arise. When they do, the parties interested therein are entitled to a jury trial in the bankruptcy court in a plenary action, the court having no jurisdiction to summarily determine such claims (*In re Russell et al.* [C. C. A.], 101 Fed. Rep. 248).

It has been held under the present act that the government will not pay the expense of a jury called in a bankruptcy case, and unless the parties provide for the same no jury will be empaneled (*In re Carter* [D. C.], 1 N. B. News, 179). The theory on which this holding is based is that the government should not be put to an expense that inures to private benefit. The reasoning appears faulty and does not seem to be in harmony with the spirit of the Act. It might be carried to a ridiculous extent by saying that the parties should also provide for the pay and expenses of the judges, otherwise no judge would act. Congress unquestionably intended that the machinery of the Federal courts should be employed in bankruptcy the same as in other cases.

²No affidavit should be taken before the attorney of record of the person making it (*In re Nebe*, 11 B. R. 289; *Taylor v. Hatch*, 12 Johns. [N. Y.], 340; *Toorle v. Smith*, 34 Kan. 27; *Prynn v. Roe*, 8 Dowling's Pr. Cas. 340; *Vary v. Godfrey*, 6 Cowan [N. Y.], 387. See also "affidavits" in Am. & Eng. Ency. of Law). A voluntary bankrupt is not guilty of a false oath in making an affidavit that he cannot obtain the sum with which to pay the filing fees, though friends would advance the same if requested, he not being required to solicit gifts or loans, or to pay the same out of his exemptions or money earned after the filing of the petition (*Sellers*

b Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

SEC. 21. Evidence.—*a* A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the State in which the proceedings are pending, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act.¹

b The right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be here-

v. Bell [C. C. A.], 94 Fed. Rep. 801). Nor is he so guilty in swearing to a schedule in which he states he has no assets when more than four months before his bankruptcy he transferred goods to his wife without consideration, such transfer being valid as to him (*In re Crenshaw* [D. C.], 95 Fed. Rep. 632).

¹See R. S. §5087. Any competent witness brought before the court upon the order in this paragraph specified, will be obliged to produce books in his possession and to answer any question directly or indirectly relating to the subjects of examination, however he may be affected thereby, unless the answer tends to actually incriminate him (*Ex p. Campbell*, L. R. 5 Ch. App. 703; *in re Fay*, 3 B. R. 660; *in re Pioneer Paper Co.*, 7 B. R. 250; *in re Feinberg*, 3 Ben. 162; s. c. 2 B. R. 425; *Garrison v. Markley*, 7 B. R. 246; *in re Stuyvesant Bank*, 6 Ben. 33; s. c. 7 B. R. 445; *in re Trask*, 7 Ben. 60; *in re Comstock*, 13 B. R. 193; *in re Fredenburg*, 2 Ben. 133; s. c. 1 B. R. 268; *in re Fixon & Co.* [D. C.], 96 Fed. Rep. 748; *in re Mellen* [D. C.], 97 Fed. Rep. 326; *in re McCormick* [D. C.], 97 Fed. Rep. 566; *in re Cliffe* [D. C.], 97 Fed. Rep. 540; *in re Horgan* [D. C.], 97 Fed. Rep. 319), unless it calls for information of a strictly confidential nature which the witness received while acting in a professional capacity (*In re Aspinwall*, 10 B. R. 448; *in re Bellis & Milligan*, 3 B. R. 199; s. c. 38 How. Pr. 79), or while occupying conjugal relations (*In re Jefferson* [D. C.], 96 Fed. Rep. 826; *in re Mayer* [D. C.], 97 Fed. Rep. 328). The scope of all inquiries is intended to enable the trustee to find assets, or the creditors to discover grounds of opposition to a discharge (*In re Horgan et al.* [C. C. A.], 98 Fed. Rep. 414). The order requiring appearance for such examination, is in effect a subpoena, and it "may run into any other district" and reach a witness living not more than one hundred miles from the place of holding court (R. S. §876; *in re Woodward*, 8 Ben. 112; s. c. 12 B. R. 297). See also as to examination of bankrupts, §7(9) and notes; and as to indemnity for expenses, Rule X.

If the evidence on a question is balanced, the scales will be turned against him who neglected to take steps open to him whereby he could have in some degree asserted the fact in dispute (*In re Hirsch* [D. C.], 96 Fed. Rep. 468).

after enacted relating to the taking of depositions, except as herein provided.¹

c Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

d Certified copies of proceedings before a referee, or of papers when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.²

e A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.³

f A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

¹See R. S. §§5003-5006 inclusive. As to taking testimony, see Rule XXII; and relating to testimony of imprisoned debtors, Rule XXX.

²See R. S. §§4992, 5119. It is not necessary to introduce the whole record; any portion of it complete and distinct in itself may be introduced in evidence (*Michener v. Payson*, 13 B. R. 49; *Dupuy v. Harris*, 6 B. Mon. 534; *Sheldon v. Clews*, 13 Abb. N. C. 40), but not for the purpose of affecting the interests of strangers to the bankrupt proceeding (*Wilson v. Harper*, 5 Rich. [N. S.], 294; *Pringle v. Leverick*, 97 N. Y. 181).

³The title of the bankrupt's property vests in the trustee the instant the adjudication is made (see §70), the same as that of a deceased vests in an administrator, and like the latter, he can exercise no control over it until his bond is approved and filed. A sale by the bankrupt after the order of adjudication and before the qualification of the trustee conveys no title, especially if the purchaser has notice of the proceeding in bankruptcy (*Davis v. Anderson*, 6 B. R. 145; *in re Neale*, 3 B. R. 177). A certified copy of the order approving the trustee's bond, however, should be recorded as early as possible to protect the trustee's title.

g A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

SEC. 22. Reference of Cases after Adjudication.—

a After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

b The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

SEC. 23. Jurisdiction of United States and State Courts.—*a* The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants¹ concerning the

¹Attaching creditors do not occupy the position of adverse claimants in such sense as to deprive the bankruptcy court of jurisdiction and necessitate proceedings against them by bills in equity or other plenary process (*Bear et al. v. Chase* [C. C. A.], 99 Fed. Rep. 920). A controversy between the trustee and adverse claimants must have (1) respect to some property or rights of property of the bankrupt transferable to or vested in the trustee, (2) the suit, whether in law or equity, must be in the name of one of the parties described in this section and (3) against the other. "All these three conditions must concur to give jurisdiction" (*Morgan v. Thornhill*, 11 Wall. 65; s. c. 5 B. R. 1; *Knight v. Cheney*, 5 B. R. 305). In view of these requirements, a landlord, whose rent is over-due, cannot bring ejectment proceedings in a State court against the bankrupt or his representative after adjudication when such proceedings will injure the general creditors. He must seek his remedy in the bankruptcy court (*In re Chambers, Calder and Co.* [D. C.], 98 Fed. Rep. 865). It has been said that one who is a debtor to the bankrupt's estate and resists the collection of a debt does not have an "adverse claim," an adverse party not necessarily being a party having an adverse claim (*Backman v. Packard*, 7 B. R. 353; s. c. 2 Saw. 264), but the United States Supreme Court says he has (*Eyster v. Gaff*, 91 U. S. 521). The claim need not be to the absolute property;

property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not

it is sufficient if it relates to a mere lien, the controversy being one for possession (*Marshall v. Knox*, 16 Wall. 551; s. c. 8 B. R. 97), or a fund, title to which is claimed by the trustee and adverse party (*Smith v. Mason*, 14 Wall. 419; s. c. 6 B. R. 1; *Burbank v. Bigelow*, 92 U. S. 179). The object of the provision under consideration is to prevent the bankruptcy court summarily determining disputes touching the title and possession of property by making strangers parties to the bankrupt proceedings. In view of this, the trustee cannot take possession of mortgaged goods in the hands of the mortgagees before bankruptcy proceedings were begun, for to do so would be to summarily bring strangers before the court of bankruptcy and determine rights which they are entitled to have settled in other courts (*In re Buntrock Clothing Co.* [D. C.], 1 N. B. News, 291; s. c. 92 Fed. Rep. 886, citing *Yestman v. Savings Inst.*, 95 U. S. 764). Nor can he take possession of property in the hands of strangers however they became possessed of it, if held adversely, on summary process (*In re Cohn* [D. C.], 98 Fed. Rep. 75). It does not, however, prevent the bankruptcy court summarily enjoining strangers from interfering with or selling the property of the bankrupt till the dispute is settled (*In re Ulrich*, 6 Ben. 483; s. c. 8 B. R. 15), though to warrant the bankruptcy court to intervene with its restraining power, the strangers must be made parties to the proceedings (*In re Ogles* [D. C.], 1 N. B. News, 326; s. c. 93 Fed. Rep. 426), which can only be done in involuntary proceedings. When a State law provides that the surplus of an income accruing to the beneficiary under a will shall be liable to claims of creditors, the same will constitute assets of a bankrupt's estate, and may be reduced to the possession of the trustee by summary proceedings in the court of bankruptcy (*In re Baudouine* [D. C.] 96 Fed. Rep. 536). Yet, if the property in dispute is exempt, and has been set apart by the trustee, the bankruptcy court can exercise no further jurisdiction thereover—either to defend such property from adverse claims or enforce liens upon it (*In re Grimes* [D. C.], 96 Fed. Rep. 529). See §2(6) and note as to jurisdiction over parties and strangers.

As between the trustee and adverse claimants, the State courts retain jurisdiction as fully as though no bankruptcy law existed, except, perhaps, as to actions of replevin when brought to divest the trustee of possession of property in his hands (*In re Russell et al.* [C. C. A.], 101 Fed. Rep. 248). "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of his rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions" (*Chattanooga Nat. Bank v. Rome Iron Co. et al.* [C. C.], 99 Fed. Rep. 82; *Eyster v. Gaff* [Supreme Court], 91 U. S. 521, citing *Smith v. Mason*, 14 Wall. 419; s. c. 6 B. R. 1; *Marshall v. Knox*, 16 Wall. 551; s. c. 8 B. R. 97; *Mays v. Fritton*, 20 Wall. 414; *Doe v. Childress*, 21 Wall. 642). It has been held, however, under the present act, that where one brings an action

been instituted, unless by consent of the proposed defendant.¹

in a State court, without leave of the bankruptcy court, to contest the ownership of property which has been taken possession of by the bankruptcy court, the latter court will enjoin such proceedings in the former (*Keegan v. King* [D. C.], 96 Fed. Rep. 758), though it will not interfere when the action regarding such property is trespass or trover (*In re Russell et al.* [C. C. A.], 101 Fed. Rep. 248).

When a State and a bankruptcy court have concurrent jurisdiction, that court which first acquires jurisdiction should retain it; and if it has in its possession, through its officers, by virtue of an attachment, replevin, execution or other process, property which under the bankruptcy act passes to the trustee, the latter should apply to the court having originally acquired jurisdiction for its possession (*Johnson v. Bishop*, 8 B. R. 533; s. c. *Wool*, 324; *Hayne v. Lucas*, 10 Pet. 400; *Peck v. Jenness*, 7 How. 612; *Pullman v. Osborne*, 17 How. 471; *Taylor v. Carryl*, 20 How. 583; *The Oliver Jordan*, 2 Curt. C. C. 414; *in re Fulton*, 1 Paine's C. C. 620; *Freeman v. Howe*, 24 How. 450; *ex p. Robinson*, 6 McLean, 355; *ex p. Dorr*, 3 How. 103; *Buck v. Colbath*, 3 Wall. 334), or for leave to be made a party to such suit and the possession of the bankrupt's share, if any, after the termination of the same (*In re Gerdes* [D. C.], 102 Fed. Rep. 318). The trustee is bound by the determination of the court after having been made a party and entered his appearance (*In re Van Alstyne* [D. C.], 100 Fed. Rep. 929. See also §116 and notes). Should a decree be fraudulently entered in a State court, the bankruptcy court will restrain proceedings thereunder, even after the bankruptcy proceedings have been terminated (*Southern Loan and Trust Co. v. Benbow* [D. C.], 96 Fed. Rep. 514).

¹A district court in which bankruptcy proceedings have been commenced and are pending has no jurisdiction to entertain a suit by the trustee in bankruptcy against a person holding, and claiming as his own, property alleged to have been conveyed to him by the bankrupt in fraud of his creditors, unless the proposed defendant consents to such jurisdiction (*Bardes v. F. N. Bank of Hawarden* [U. S. Sup. Ct.], 20 Sup. Ct. Reporter, 1000; *Mitchell v. McClure et al.* [U. S. Sup. Ct.], 20 Sup. Ct. Reporter, 1000; s. c. [D. C.], 91 Fed. Rep. 621; *Heath v. Shaffer* [D. C.], 93 Fed. Rep. 647; *Burnett v. Mercantile Co.* [D. C.], 91 Fed. Rep. 365; *Camp v. Zellars* [C. C. A.], 94 Fed. Rep. 799; s. c. 36 C. C. A., 501; *Goodier v. Barnes* [C. C.], 94 Fed. Rep. 798; *Hicks v. Knost* [D. C.], 94 Fed. Rep. 625; *in re Baudouine* [C. C. A.], 101 Fed. Rep. 574; *Hill v. Kincell et al.* [C. C. A.], 102 Fed. Rep. 301; *in re San Gabriel Sanitorium Co.* [C. C. A.], 102 Fed. Rep. 310). A number of courts have held the contrary of the rule just stated (*in re Woodbury et al.* [D. C.], 98 Fed. Rep. 833; *Carter v. Hobb* [D. C.], 92 Fed. Rep. 594; *Perkins v. McCauley* [D. C.], 98 Fed. Rep. 286; *Shutts v. F. N. Bank* [D. C.], 98 Fed. Rep. 705; *in re Hammond* [D. C.], 98 Fed. Rep. 845; *Pepperdine v. Headley et al.* [D. C.], 98 Fed. Rep. 863; *Norcross v. Nathan et al.* [D. C.], 99 Fed. Rep. 414; *Lehman v. Crosby et al.* [D. C.], 99 Fed. Rep. 502; *Cox v. Wall et al.* [D. C.], 99 Fed. Rep. 546; s. c. [C. C. A.], 101 Fed. Rep. 403; *in re Sievers* [D. C.], 91 Fed. Rep. 366; *in re Smith* [D. C.], 92 Fed. Rep. 135; *in re Richard* [D. C.], 94 Fed. Rep. 633; *in re Newberry* [D. C.], 97 Fed. Rep. 24; *Robinson v. White* [D. C.], 97 Fed. Rep. 33). These decisions were before the opinion of the Supreme Court in *Bardes v. F. N. Bank of Hawarden*, the holding in which settles the point on which the courts had been at such variance. A few courts also held that the jurisdiction of the bankruptcy, the circuit and the State courts was concurrent (*Louisville Trust Co. v. Marx et al.* [D. C.], 98 Fed. Rep. 456; *Robinson v. White* [D. C.], 97 Fed. Rep. 33), but these decisions, as those last cited, lose their force as authority by the holding of

c The United States circuit court shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act.¹

SEC. 24. Jurisdiction of Appellate Courts.—*a* The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

b The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction.² Such power shall be exercised on due

the supreme court in the above cases. The consent of the proposed defendant as referred to in the supreme court decisions and as specified in the paragraph of the act under discussion, will be presumed to have been given by one who submits without objection to the jurisdiction of a court in which he could not properly be sued (*In re Connolly* [D. C.], 100 Fed. Rep. 620).

¹The United States circuit court has no jurisdiction to set aside a fraudulent transfer by the bankrupt at the suit of the trustee, the "offenses enumerated in this act" referring to the "crimes" described in §29 (*Goodier v. Barnes et al.* [D. C.], 1 N. B. News, 383; s. c. 94 Fed. Rep. 798).

²Under the provisions of this paragraph, all questions of law are summarily reviewable irrespective of whether they arose in actions at law or in equity (*In re York & Hoover*, 1 Abb. C. C., 503; s. c. 4 B. R. 479), though they must have arisen in the cause and relate to some action taken or order made in the course of a proceeding in bankruptcy (*In re Jacobs* [C. C. A.], 99 Fed. Rep. 539). In a review under this paragraph, questions of fact will not be considered (*In re Rosser* [C. C. A.], 101 Fed. Rep. 562; *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.* [C. C. A.], 101 Fed. Rep. 699; *in re Eggert* [C. C. A.], 102 Fed. Rep. 735), though the review of questions of law, while summary, is as extensive as may be had by a formal appeal under §250 in so far as the question of law arising in strictly bankrupt proceedings is concerned; but questions of fact or questions of law arising in other than strictly bankrupt proceedings will not be considered (*In re Purvine* [C. C. A.], 96 Fed. Rep. 192; *in re Richards* [C. C. A.], 96 Fed.

notice¹ and petition² by any party aggrieved.

SEC. 25. Appeals and Writs of Error.³—*a* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or

Rep. 935; *in re Good* [C. C. A.], 99 Fed. Rep. 389; *in re Jacobs* [C. C. A.], 99 Fed. Rep. 539). If doubt exists as to whether one's remedy is under this or the next section, he may appeal and file a petition for review, and the matter complained of may be determined in either or both proceedings (*In re Derby* [C. C. A.], 102 Fed. Rep. 808). When a case has been once before the appellate court and reviewed, under the provisions of this section, the decision becomes the law of the case, and the same question will not be again reviewed on a subsequent appeal or writ of error under §25 (*Mutual Reserve Fund Life Ass'n v. Beatty* [C. C. A.], 93 Fed. Rep. 747). An order of the district court will not be disturbed if an abuse of discretion does not appear. Such abuse is not present in an order fining the president of a corporation, not a party to the bankrupt proceedings, for refusing to produce the books of the corporation for examination, the legitimate objects of an examination being to discover assets or grounds for opposing a discharge (*In re Horgan* [C. C. A.], 98 Fed. Rep. 414).

Where a petition for review is filed during the term at which the order sought to be reviewed is made, the circuit or district court retains jurisdiction to act upon such petition at a succeeding term, and the time for appeal does not begin to run until such action is taken, any time within six months after which the petition for review may be filed in the circuit court of appeals (*In re Derby* [C. C. A.], 102 Fed. Rep. 808).

¹For the purpose of review, the notice may be served on the attorney who appears of record in the proceedings (*Ala. & Chat. R. R. Co. v. Jones*, 5 B. R. 97). If such notice is not followed up by a prosecution of the appeal, it will be dismissed (*In re Hawry & Co.* [D. C.], 1 N. B. News, 398).

²The petition should be filed without unreasonable delay and within the period within which an appeal may be taken (*Bank v. Cooper*, 20 Wall. 171; *Littlefield v. Del. & H. Canal Co.*, 4 B. R. 257), though it has been considered as within due time when filed before the order complained of has been carried into execution (*In re Casey*, 10 Blatch. 376; s. c. 8 B. R. 71). It should set out the alleged error and enough of the facts to enable the appellate court to fully understand the questions of law (*In re Casey*, *supra*). The filing of the petition does not operate as a stay of proceedings, so that if this is desired, application therefor should be made to the circuit court, when a stay will be granted if it appears from the showing that applicant would otherwise suffer further material injury (*In re Oregon Bulletin Co.*, 3 Saw. 529; s. c. 14 B. R. 394).

³Relating to appeals, see Rule XXXVI, and as to review by the judge, Rule XXVII. The appeal provided for in this section is open to all parties to the bankruptcy proceedings (*In re Meyer et al.* [C. C. A.], 98 Fed. Rep. 976), and all questions of law, whether arising in strictly bankrupt proceedings or not, as well as all questions of fact, will be reviewed (*In re Richards* [C. C. A.], 96 Fed. Rep. 935; *in re Good* [C. C. A.], 99 Fed. Rep. 389; *in re Jacobs* [C. C. A.], 99 Fed. Rep. 539).

denying a discharge; and (3) from a judgment allowing¹ or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered,² and may be heard and determined by the appellate court in term or vacation, as the case may be.

¹Under the former act, it was held that only the trustee could take an appeal from a decision *allowing* a claim (*In re Troy Woolen Co.*, 9 Blatch. 191; s. c. 6 B. R. 16). That decision, however, was under a statute which expressly provided that only the trustee [there called assignee] could take such appeal (Act 1867, §8). The present Act does not so limit the appeal, and while it is silent on the subject, a fair inference would be that any party to the proceeding, whose interests have been injuriously affected by the decision, may appeal therefrom. This view has one decision in its support (*In re Roche* [C. C. A.], 101 Fed. Rep. 956), though another is opposed to it (*Chatfield et al. v. O'Dwyer et al.* [C. C. A.], 101 Fed. Rep. 797). In another decision, though involving the right of an intervening creditor to appeal from an adjudication, the court used language to the effect that any creditor affected by any order or decree was entitled to appeal (*In re Meyer* [C. C. A.], 98 Fed. Rep. 976).

The appeal is not confined to the allowance or rejection of creditor's claims. It lies from the allowance of a fee allowed the attorney for the petitioning creditors, when it amounts to \$500 or more (*In re Curtis et al.* [C. C. A.], 100 Fed. Rep. 784), and from the allowance or rejection of a lien, asserted in proving a claim (*Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.* [C. C. A.], 101 Fed. Rep. 699).

²The appeal must be taken within ten days after the decree of the district court. It is not enough that it be allowed, but the prayer for the appeal, its allowance, the citation and service thereon as well as the bond must be filed within the time in the district court (*Norcross v. Nare & McCoral Mercantile Co. et al.* [C. C. A.], 101 Fed. Rep. 796). The time prescribed is jurisdictional, and unless the appeal is taken within it, the appellate court acquires no jurisdiction (*Sedgwick v. Fridenberg*, 11 Blatch. 77; *Hawkins v. Hastings*, 1 Dill. 453; *Wood v. Bailey*, 21 Wall. 640; s. c. 12 B. R. 132; *York v. Hoover*, 4 B. R. 479; s. c. 1 Abb. C. C. 503). The district court, however, may in its discretion, review the decree, thereby enabling an appeal to be taken within the statutory time (*Stickney v. Will*, 11 B. R. 97; s. c. 23 Wall. 150). The review on appeal contemplates a consideration of issues of fact and law (*Simonson v. Sinsheimer et al.* [C. C. A.], 100 Fed. Rep. 426; *Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co.* [C. C. A.], 101 Fed. Rep. 699).

Where an appeal was taken on an interlocutory order, not falling within the classes of this section, it was treated as a petition for review pursuant to §246, the court remarking that its treatment was not intended as a future precedent (*In re Russell et al.* [C. C. A.], 101 Fed. Rep. 248). Ordinarily, the appeal would fall to the lot of the trustee, he being the representative of the creditors. He is not the representative of any particular creditor, however, and if he refused to act, the interest of the creditor injuriously affected by the decision would be jeopardized unless he was at liberty to take the appeal. There is no reason why a creditor should not have this privilege for he is as much a party to the proceedings as the trustee (*Marsh v. Armstrong*, 20 Minn. 81; s. c. 11 B. R. 125).

b From any final decision of a court of appeals, allowing or rejecting a claim¹ under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other :

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States ; or

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

c Trustees shall not be required to give bond when they take appeals or sue out writs of error.

¹This is the only instance under this statute in which an appeal to the supreme court will lie—allowance or rejection of a claim. It has been said that it is within the power of Congress to place such limitations upon appeals as it may deem proper (*Ex p. Christy*, 3 How. U. S. 292). Ordinarily that is true; but as a general proposition, it does not seem to be sound. A bankruptcy law is an extraordinary one—so much so that the privilege of enacting such laws is denied every State in the Union, and is only conferred upon Congress under certain definite constitutional limitations. To be valid every law enacted upon the subject of bankruptcy must be uniform throughout the United States (U. S. Const., Art. I, §8). This means that the law must be established and put into force in every State and Territory of the Union (*Sturges v. Friedlander*, 11 B. R. 21), and in every State and Territory it must operate the same (*In re Silverman*, 4 B. R. 523; *in re Reiman & Friedlander*, 11 B. R. 21; *Leidigh Carriage Co. v. Stengel* [C. C. A.], 1 N. B. News, 296 387; s. c. 95 Fed. Rep. 637). A petitioner who in one State or Territory is adjudged a bankrupt, discharged from his debts, or refused a discharge, under the same state of facts, in any other State or Territory should be respectively adjudged a bankrupt, discharged from his debts, or refused a discharge. That would be a uniform operation. If such condition cannot be realized, the law would not be uniform for the reason that it did not operate uniformly. The various judicial circuits may be divided in conclusions upon the same state of facts. They have been so divided under every former act and there is no reason to expect entire harmony under the present statute, for the justices of the different circuits are much like the members of a jury—if they reach different conclusions they will entertain them until brought into harmony by the opinion of a court uniformly construing the act, with which each circuit must abide. This end is not possible under the present statute, since there is no such court to which the litigants of the various districts may resort, except in the one instance of the allowance or rejection of a claim, and then only in special cases.

d Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

SEC. 26. Arbitration of Controversies.¹—*a* The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

b Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

c The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.²

SEC. 27. Compromises.—*a* The trustee may, with the approval of the court,³ compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

SEC. 28. Designation of Newspapers.—*a* Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this act and orders which the court may direct to be published shall be inserted. Any court may in a par-

¹See Rule XXXIII as to arbitrations.

²The finding under this paragraph may be set aside or adjudged upon by the court in like manner as a verdict would be. If the arbitrators are not chosen in strict conformity with the provisions of the preceding paragraph, the finding will be set aside, it being irregular for one of the arbitrators to be chosen by the trustee, one by the other party and the third agreed upon by the two contending parties (*In re McLam* [D. C.], 97 Fed. Rep. 922).

³The approval of the court must be obtained in each case, the creditors not having authority to direct the trustee in the matter (*In re Dibblee*, 3 Ben. 354).

ticular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

SEC. 29. Offenses.—*a* A person shall be punished by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document¹ belonging to a bankrupt estate which came into his charge as trustee.

b A person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy ;² or (2) made a false oath³ or account in, or in relation to,

¹A document under the definition in this act is any book, deed, or instrument in writing (§1 [13]).

²"Conceal" includes secrete, falsify and mutilate (§1 [22]). Before a bankrupt can be convicted of concealing assets, it must first be shown by competent evidence that he was possessed of the property, or that it existed in trust for his use at the time of filing the petition, the burden being on those preferring the charge, and the bankrupt being at liberty to prove, in denial, any facts tending to show that if property was concealed within the meaning of the act, it was without fault on his part and inadvertently and not intentionally done (*In re Cornell* [D. C.], 97 Fed. Rep. 29; *in re Skinner* [D. C.], 97 Fed. Rep. 190; *in re Hyman* [D. C.], 97 Fed. Rep. 195; *in re Hirsch et al.* [D. C.], 97 Fed. Rep. 571; *in re Morrow* [D. C.], 97 Fed. Rep. 574; *in re O'Gara* [D. C.], 97 Fed. Rep. 932; *in re Freund* [D. C.], 98 Fed. Rep. 81; *in re DeLeeuw* [D. C.], 98 Fed. Rep. 408; *in re McAdam* [D. C.], 98 Fed. Rep. 409; *in re Wood* [D. C.], 98 Fed. Rep. 972; *in re Ablowich et al.* [D. C.], 99 Fed. Rep. 81), but when a large unaccountable shrinkage appears, together with a fraudulent failure to keep books, the offense will be considered as established (*In re Cashman* [D. C.], 103 Fed. Rep. 67).

³The schedule required by §7(8) must be sworn to, and if one wilfully and fraudulently omits from it any material asset or debt, he may be subject to punishment therefor under this section (See *U. S. v. Nichols*, 4 McLean, 23). A bankrupt who omits items from his schedule under the advice of his attorney after fully and fairly submitting all the facts touching his property, is not guilty of perjury in so doing, there being no fraudulent intent (*U. S. v. Conner*, 3 McLean, 573). And this may be true even though he does not so submit the facts, for the oath, to be false, must be such as to amount to a knowing and fraudulent concealment of property from the trustee (*In re Hirsch* [D. C.], 96 Fed. Rep. 468; *in re Dews* [D. C.], 101 Fed. Rep. 549). A concealment arises if a bankrupt, in his schedule, falsely states that he is unable to find the books of account used in his business, and that he does not know where they are when in fact they are in the custody of

any proceeding in bankruptcy ; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney ; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act ; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested ; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee ; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

one of his creditors, where he knows them to be and where he has access to them (*In re Kamsler* [D. C.], 97 Fed. Rep. 194). One is not guilty of making a false oath who makes an affidavit that he cannot obtain the sum required for filing fees, though friends would have advanced the amount if requested, the bankrupt not being required to solicit gifts or loans from his friends for the purpose of paying the filing fees, to pay the same out of his exemptions, or out of money earned by him after the filing of the petition (*Sellers v. Bell* [C. C. A.], 94 Fed. Rep. 801), nor for false testimony given in a State court under an insolvency proceeding, such testimony having been transcribed and filed with the referee by stipulation of the attorneys in lieu of an examination, the bankrupt not being a party to the agreement that it should be treated as evidence in the bankruptcy proceedings (*In re Goldsmith* [D. C.] 101 Fed. Rep. 570). Nor is one who transfers property to his wife, more than four months before filing his petition, guilty of making a false oath in swearing to a schedule in which he states that he has no property, the transfer being valid as to the bankrupt (*In re Crenshaw* [D. C.], 95 Fed. Rep. 632). A bankrupt, however, who has in his possession, at the time of filing his petition, money paid to him under a policy of accident insurance, is guilty of making a false oath in stating that he has no cash in hand (*In re Roy* [D. C.], 96 Fed. Rep. 400). But to charge one with a false oath, the opposing creditor must set out a full and clear statement of the facts, such general charges as "withheld property from his creditors" not being sufficient (*In re Hirsch* [D. C.], 96 Fed. Rep. 468). See also §7(9) and notes thereto relative to false swearing by persons being examined in bankruptcy cases.

d A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

SEC. 30. Rules, Forms, and Orders.—*a* All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.¹

SEC. 31. Computation of Time.—*a* Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next thereafter which is not a Sunday or a legal holiday.²

SEC. 32. Transfer of Cases.—*a* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction to

¹There is a tendency on the part of District Judges to promulgate rules for their particular districts. There is no direct or positive authority authorizing such practice, though §38(4) inferentially would seem to warrant it. The general rules adopted by the Supreme court must govern in all districts. If special rules are adopted, it is safe to say they can only relate to matters which will not affect the rights of parties, though by special order in a *particular case* the rules may be modified so as to facilitate a speedy hearing (See Rule XXXVII). The tendency springs from the general practice and inherent power of courts of record to make their own rules. This inherent power, it would seem, cannot extend to courts of bankruptcy, since the tendency of such district rules is to detract from that uniformity of operation which must characterize bankruptcy laws and which is not essential to other laws. See Rule XXXVII as to general provisions, and Rule XXXVIII as to forms.

²In computing the four months between the commission of an act of bankruptcy and the filing of the petition, the day of the commission of the act is excluded and that of the filing of the petition included (*In re Stevenson* [D. C.], 1 N. B. News, 313; s. c. 94 Fed. Rep. 110). A petition in involuntary bankruptcy, filed under this Act on Nov. 1, 1898, was not premature (*Leidigh Carriage Co. v. Stengel* [C. C. A.], 1 N. B. News, 387; s. c. 95 Fed. Rep. 637). See also §606 and notes as to preferences given within four months before the filing of the petition in bankruptcy.

and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.¹

¹See Rule VI as to petitions filed in different districts. When they are so filed, if a question of jurisdiction arises because of the uncertainty of the bankrupt's residence or domicile, proceedings under the second petition will be stayed that the court having consideration of the first petition may determine the question (*In re Waxelbaum* [D. C.], 98 Fed. Rep. 589).

CHAPTER V.

OFFICERS, THEIR DUTIES AND COMPENSATION.

SEC. 33. Creation of Two Offices.—*a* The offices of referee and trustee are hereby created.¹

SEC. 34. Appointment, Removal, and Districts of Referees.—*a* Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees,² each for a term of two years, and may, in their discretion, remove them³ because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

SEC. 35. Qualifications of Referees.⁴—*a* Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law,⁵ to any of the judges of the courts of bankruptcy or circuit courts of the United States,

¹The referee and trustee were designated as the register and assignee respectively under the former act.

²For analogous provisions under former acts, see Act of 1800, §2; 1841, §5; 1867, §3; R. S. §4993. See also §18 as to courts and procedure therein.

³For analogous provisions, see Act of 1867, §5; R. S. §4997.

⁴For analogous provisions, see Act of 1867, §3; R. S. §§4994, 4995.

⁵Under the common law, the degree of consanguinity is determined by counting up from either of the persons related to the common ancestor and then down to the other person related, reckoning a degree to each person ascending and descending, counting the common ancestor but once, including one of the persons related and excluding the other (*Redfield's Surrogate's Practice*, 5th Ed., p. 669; 3 Am. & Eng. Ency. of Law, 661). It has been held that the degree of affinity is reckoned in the same manner (*Kelly v. Neely*, 12 Ark. 667).

or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in the territorial districts for which they are to be appointed.

SEC. 36. Oaths of Office of Referees.—*a* Referees shall take the same oath of office as that prescribed for judges of United States courts.¹

SEC. 37. Number of Referees.—*a* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.²

SEC. 38. Jurisdiction of Referees.³—*a* Referees respectively are hereby invested, subject always to a review⁴ by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) con-

¹For analogous provisions, see Act of 1867, §3; R. S. §4995. Under §712 of the R. S., the justices of the Supreme court and the circuit and district judges are required to take the following oath: "I, _____ do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as _____, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States: so help me God."

²For analogous provisions, see Act 1867, §3; R. S. §4993.

³For analogous provisions, see act 1867, §§4, 6; R. S. §§4998, 5009, 5010. As to orders of referee, see Rule XXIII; as to transmission of proved claims to clerk, Rule XXIV; as to review "by the judge of orders made by the referee", Rule XXVII; and as to the production of imprisoned debtor on *habeas corpus*, Rule XXX. See also §18 as to courts and procedure therein.

The jurisdiction of a referee cannot be first questioned on petition to review (*In re Emrich* [D. C.], 101 Fed. Rep. 231), nor collaterally assailed when the statute does not therewith vest the judge alone (*Geisreiter v. Seiver*, 33 Ark. 522).

⁴The referee's orders are reviewable (Rule XXVII; *in re Scott et al.* [D. C.], 99 Fed. Rep. 404), and when the same is desired, the petition therefor must be filed with the referee (*In re Schiller* [D. C.], 96 Fed. Rep. 400), though in a contest between the bankrupt and one of his creditors, the decisions of the referee cannot be certified to the judge for review when the referee's finding is not followed by any order made by him and the exceptant does not file a petition setting forth the error alleged to have been committed (*In re Smith* [D. C.], 93 Fed. Rep. 791). The referee's findings on questions of fact will not be disturbed on review unless manifestly erroneous (*In re Rome Planing Mill Co.* [D. C.], 99 Fed. Rep. 937; *in re Waxalbaum* [D. C.], 101 Fed. Rep. 228). The review is not general, but of the special grievance complained of (*In re Kelly Dry-Goods Co.* [D. C.], 102 Fed. Rep. 747).

sider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions;¹ (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them,² except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act;³ (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on

¹Only involuntary petitions in which no pleadings have been filed and voluntary ones can be referred to the referee for adjudication, and these only when the judge is absent from the district at the time the reference is made (§18 [f and g]), though after adjudication the judge may refer them for such action as he deems proper touching the administration (§22). It is the duty of the judge alone to act on all contested petitions (§18[d]). When a voluntary petition is filed by less than all the members of a firm and is contested by the members not joining, as to the petitioners, the petition is voluntary and as to the partners not joining, it is involuntary. If such a petition be referred to the referee, he will have no jurisdiction to make the adjudication, and must certify it to the judge for determination (*In re Murray* [D. C.], 96 Fed. Rep. 600). The fact that the referee is a debtor of a bankrupt will not disqualify him from acting in a case referred to him (*Bray v. Cobb* [D. C.], 1 N. B. News, 209; s. c. 91 Fed. Rep. 102).

²The referee may make an order to examine a witness without a formal application showing the questions to be asked or what particular facts the witness is to be interrogated concerning (*In re Howard* [D. C.], 95 Fed. Rep. 415). A witness cannot refuse to attend, produce books, or answer questions on technical grounds when summoned for examination under §21 (*In re Fixen & Co.* [D. C.], 96 Fed. Rep. 748). See also as to examination of bankrupt, §7(9); and as to the taking of testimony and production of witnesses before referee, §21, together with the notes to these sections.

³After the case has been referred to the referee, he has authority to order the bankrupt to surrender to the trustee any property which he may have belonging to the estate (*In re Tudor* [D. C.], 96 Fed. Rep. 942; *in re McCormick* [D. C.], 97 Fed. Rep. 566; *in re Schlesinger* [D. C.], 97 Fed. Rep. 930; *in re Mayer* [D. C.], 98 Fed. Rep. 839). It has also been held that a referee has jurisdiction to cite the bankrupt to appear and show cause why certain property in his possession should not be forthwith delivered to the trustee as assets in the estate, without the clerk's certificate as provided for in this paragraph, and without even a copy of the order of reference in the case as specified in Rule XII, where a special district rule had been adopted to the effect that all cases are referred without special order to the referee (*In re Oliver* [D. C.], 1 N. B. News, 329; s. c. 96 Fed. Rep. 85).

courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided;¹ and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

SEC. 39. Duties of Referees.²—*a* Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable;³ (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended;⁴ (3) furnish such information concerning the estates in process of adminis-

¹In the discharge of such duties as are contemplated by this subdivision of the section, the referee has authority to inquire into and determine the validity of contracts made by a corporation with its officers (*In re Grubbs-Wiley Grocery Co.* [D. C.], 1 N. B. News, 381; s. c. 96 Fed. Rep. 183), determine the allowance of counsel fees (*In re Scotts* [D. C.], 1 N. B. News, 326), issue injunctions and appoint trustees (*In re Kilian* [D. C.], 1 N. B. News, 267), appoint appraisers and order property sold free of liens (*In re Styer* [D. C.], 98 Fed. Rep. 290).

As to expenses of administration of a bankrupt estate, allowance of attorney fees, etc., see §64*b*, and as to the appointment of trustees, §44 and Rules XV, XVIII, together with the notes to same relative to appointment of receiver pending that of trustee. In applications for a discharge referred to him, his authority is not limited to reporting the evidence, but he should report findings and recommendations (*In re Kaiser* [D. C.], 99 Fed. Rep. 689), but he cannot grant the discharge, and that duty cannot be delegated to him (*In re McDuff* [C. C. A.], 101 Fed. Rep. 241).

²For analogous provisions, see R. S. §§4998, 5000, 5001; Act of 1867, §24 and 5. See also Rule II as to endorsing papers, Rule III as to blanks to be furnished referee, Rule X as to referee's authority to require indemnity for expenses, Rule XII as to references of cases to and scope of referee's authority, Rule XVI as to notice to trustee of appointment, Rule XXI relating to proof of debts, Rule XXII touching the taking of testimony, Rule XXIII as to arbitrations, Rule XXVI as to referee's accounts, Rule XXVII as to review of referee's action by the judge and Rule XXIX as to payment of money out of deposit.

³As to the declaration and payment of dividends, see §65 and notes thereto.

⁴As to the contents of and duty of bankrupt to fill schedules, see §7(8) and notes thereto. As to the manner in which the schedule should be drawn, see Rule V; as to the duty of petitioning creditors to file, Rule IX; and as to the right to amend, Rule XI.

The schedules are not a part of the petition, and an adjudication in bankruptcy need not be postponed awaiting their amendments (*In re Patterson*, 1 Ben. 517; s. c. 1 B. R. 125).

tration before them as may be requested by the parties in interest;¹ (4) give notices to creditors as herein provided;² (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges;³ (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.⁴

b Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys

¹It is an offense for the referee to refuse parties in interest a reasonable opportunity to inspect accounts, papers and records relating to a bankrupt estate (§29[3]). The trustee must also furnish information (§47[5]), and the accounts and papers of both officials must be open to the inspection of officers and interested parties (§49).

²See §58 touching notices to creditors.

³See §42 as to the records of referees, and §2(10) relative to the duty of the court [judge] in regard to the findings.

⁴See §51a(3) and Rule XII[1] as to duty of clerk to transmit or deliver papers in matters referred to the referee. Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk (Rule XX).

and counselors at law in any bankruptcy proceedings ; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.¹

SEC. 40. Compensation of Referees.²—*a* Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt,³ and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.⁴

b Whenever a case is transferred from one referee to another the judge shall determine the proportion in which

¹The violation of the first and third subdivisions of this paragraph is an offense punishable under §29c. It has been held, however, that a referee is not directly or indirectly interested within the meaning of the Act when he acts in a case where he is a debtor to the bankrupt (*Bray v. Cobb*, 1 N. B. News, 209; s. c. 91 Fed. Rep. 102).

²For analogous provisions, see R. S. §§5008 and 5125; Act of 1867, §§4 and 5. See also Rule XXXV as to compensation of clerks, referees and trustees.

³The filing fee paid by a partnership bankrupt is all the fees required under the Act, notwithstanding that the members of the firm receive individual discharges, as all steps or actions constitute but one proceeding (*In re Langelow et al.* [D. C.], 98 Fed. Rep. 869; *in re Gay et al.* [D. C.], 98 Fed. Rep. 870). It has been held, however, in an opinion that seems inharmonious with both the terms and spirit of the statute, that for services rendered after the application for a discharge on an issue framed in opposition thereto, the referee is entitled to fees in addition to those provided for in this section (*Fellows et al. v. Frendenthal* [C. C. A.], 102 Fed. Rep. 731). The holding is based upon the conclusion that the referee in such case does not act in the capacity of referee, but as a special master. See §51(2) as to when a voluntary bankrupt is excused from paying filing fees.

⁴The commissions and fees provided for in this paragraph are not payable until the work of the referee is completed, and this stage is marked by the transmission of his records to the clerk (§39[7]), after which the clerk pays the fee (§51[4]). "A dividend in bankruptcy is a parcel of the fund arising from the assets of the estate, rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors, or in a different proportion" (*In re Barber et al.* [D. C., Minn.], 97 Fed. Rep. 547). The case cited further holds that referees and trustees are entitled to commissions on money paid on secured debts, a conclusion which other courts have been unable to reach (*In re Slevin*, 4 Dill, 131, Fed. Cas. No. 12,942; *in re Sabine* [D. C.], 1 N. B. News, 312; *in re Ft. Wayne Electric Corp.* [D. C.], 1 N. B. News, 301; s. c. 94 Fed. Rep. 109; *in re Fielding* [D. C.], 96 Fed. Rep. 800). The commissions must be computed by the per cent.; they cannot be "lumped" (*In re Carolina Cooperage Co.* [D. C.], 96 Fed. Rep. 950).

the fee and commissions therefor shall be divided between the referees.

c In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

SEC. 41. Contempts before Referees.¹—a A person shall not, in proceedings before a referee (1) disobey or resist any lawful order, process or writ;² (2) misbehave during a hearing, or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed; or, upon appearing, refuse to take the oath as a witness; or, after having taken the oath, refuse to be examined according to law.³ *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.⁴

¹For analogous provisions, see R. S. §§4999, 5002, 5005, 5006; Act of 1800, §§14, 15; Act of 1867, §§4, 5, 7.

²Where one is properly subpoenaed and refuses or neglects to attend, he can purge himself of the contempt by showing that he lives outside the State or more than one hundred miles from the place where he is subpoenaed to attend (See R. S. §876). The disobedience of an order requiring the bankrupt to pay over to the trustee money belonging to the estate will be punished as contempt (*In re Purvine* [C. C. A.], 96 Fed. Rep. 192; s. c. 37 C. C. A. 446; *in re Tudor* [D. C.], 96 Fed. Rep. 942; *in re Rosser*, Id. 308; *in re McCormick* [D. C.], 97 Fed. Rep. 566; *in re Schlesinger*, Id. 930; *in re Mayer* [D. C.], 98 Fed. Rep. 839; *in re Deuell* [D. C.], 100 Fed. Rep. 633; *Ripon Knitting Works et al. v. Schreiber* [D. C.], 101 Fed. Rep. 810). One will not be guilty of contempt, however, for threatening to make a levy, where no levy, which would be contempt, is made (*In re McBryde* [D. C.], 99 Fed. Rep. 686).

³A witness cannot refuse to attend, to produce books and answer questions relating to the subject of examination on technical grounds, though it has been held that if he refuses to produce books in good faith and by direction of counsel, he will not be punished for contempt (*In re Fixen & Co.* [D. C.], 96 Fed. Rep. 748).

⁴This proviso, fairly construed, will allow the referee to examine and subpoena witnesses for examination outside the State, but not at a greater distance than one hundred miles from the place of his residence. If the distance is greater and an

b The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.¹

SEC. 42. Records of Referees.²—*a* The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

SEC. 43. Referee's Absence or Disability.³—*a* Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an ap-

oral examination is desired, the court may order them to appear before any judge of any State court, and undoubtedly before any referee in bankruptcy within one hundred miles of the witness (§21*a*).

¹If the court deems it proper, on a motion to punish the bankrupt for contempt, it may refer the case back to the referee to take such testimony as may be offered tending to purge the offense (*In re Speyer*, 6 B. R. 255).

²For analogous provisions, see R. S. §5000; Act of 1867, §4. As to papers filed after reference, see Rule XX. Certified copies of these records are admissible as evidence (§21*d*).

³For analogous provisions, see R. S. §5007; Act of 1867, §4.

pointment under the same court may, by order of the judge, temporarily fill the vacancy.¹

SEC. 44. Appointment of Trustees.²—*a* The creditors of a bankrupt estate shall, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside, or a discharge revoked, or if there is a vacancy in the office of trustee,

¹The judge may also, at any time, for the convenience of the parties, or for cause transfer a case from one referee to another (§226).

²For analogous provisions, see R. S. §5034; Act of 1867, §13; and as to appointment of an assignee to fill vacancy, R. S. §5041; Act of 1867, §18. See also §55 as to meetings of creditors, and §56 as to who may vote thereat.

The appointment of the trustee is subject to approval by the judge, by whom only he can be removed (Rule XIII; §2[17]). If, after a reasonable opportunity, the creditors are unable to agree upon a trustee, or fail to appoint one, the judge or the referee may make the selection (Rule XIII; §2[17]); *in re Kuffler* [D. C.], 97 Fed. Rep. 187; *in re Lewensohn* [D. C.], 98 Fed. Rep. 576; *in re Brooke* [D. C.], 100 Fed. Rep. 432, though no official or general trustee to act in classes of cases can be appointed (Rule XIV). An attorney at law, retained generally to represent a creditor in bankruptcy proceedings cannot participate in the selection of the trustee at the creditors' meeting without showing an express authorization as an attorney in fact (*In re Blankfein et al.* [D. C.], 97 Fed. Rep. 191). If there are no assets and no creditor appears at the first meeting, a trustee need not be appointed, though if assets are afterwards discovered, or the court deems it desirable, he may then be appointed (Rule XV; *in re Smith* [D. C.], 93 Fed. Rep. 791; *in re Levy* [D. C.], 101 Fed. Rep. 247). When an appointment is made, the person selected must be notified by the referee (Rule XVI), but the better practice is to get his consent before his appointment so that the creditors would not be obliged to again convene in the event of his refusal (*In re Lewensohn* [D. C.], 98 Fed. Rep. 576). The approval of the judge is a judicial act, and he will not disregard the choice of the creditors unless the person selected by them is incompetent, related to the parties or of an immoral character (*In re Barrett*, 2 B. R. 533; *in re Grant*, 2 B. R. 106), though if his appointment result from fraud or improper influence, the same will justify the court in disapproving it (*In re Haas & Sampson*, 8 B. R. 189; *in re Bliss*, 1 B. R. 78; s. c. 1 Ben. 407). The burden of establishing the improper choice of a trustee is with the one opposing his approval, but if his integrity or competency are reasonably suspected, he may be rejected (*In re Clairmont*, 1 Lowell, 230; s. c. 1 B. R. 276). The trustee of a partnership is to be appointed by the firm creditors, whether there be assets or not, creditors of individuals of the firm having no voice in the selection (§56; *in re Phelps, Caldwell & Co.*, 1 B. R. 525). This is undoubtedly true when the petition asks only for a discharge from firm debts; but when a release from both firm and individual debts is sought, the creditors of the individuals have an unquestionable right to either participate in the choice of the trustee or select one to represent the individual creditors. The latter alternative would give rise to a complication of proceedings, while the former would be in harmony with the principles of equity to which the court of bankruptcy must conform in the absence of express provisions (Rule XXXVII). When three trustees are appointed, the assent of at least two of them is necessary to all official acts (§476).

appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided the court shall do so.¹

SEC. 45. Qualifications of Trustees.²—a Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed,³ or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

SEC. 46. Death or Removal of Trustees.⁴—a The death or removal of a trustee shall not abate any suit or

¹A secured creditor is not entitled to vote on the election of trustee unless his claim exceeds the value of or he surrenders his security (*In re Eagles et al.* [D. C.], 99 Fed. Rep. 695).

²For analogous provisions, see R. S. §5035; Act of 1867, §18.

³A preferred creditor, or a director of a corporation having a preferred claim should not be chosen, since his interest would be incompatible with his interest as trustee (*In re Powell*, 2 B. R. 45). An attorney for either a creditor or the bankrupt may be chosen, though if his duties in the two positions become inconsistent, he should either resign or cease to act for such clients (*In re Clairmont*, 1 Lowell, 230; s. c. 1 B. R. 276).

⁴For analogous provisions, see R. S. §§5036, 5039, 5042; Act of 1867, §§13, 18. See also §44 as to the appointment of trustees and §47^b as to the concurrence required when three have been appointed.

A vacancy in the office of trustee can only occur by death or removal. The court has authority under the express provisions of the statute to remove only for cause upon the complaint of creditors (§2[17]), though in the exercise of its equity jurisdiction, the court may allow the trustee to resign, in which case he should not be allowed his costs of the proceedings, though if he is removed for the benefit of the estate without fault on his part, he should be reimbursed out of the estate for all his costs and expenses incurred (*Ex p. Watts*, 1 Deac. & Chitt. 22; *ex p. James*, 1 Deac. & Chitt. 372). He should have the costs of defense if he successfully resists an attempt to remove him (*In re Mallory*, 4 B. R. 153; *in re Blodget & Sanford*, 5 B. R. 472), though if removed for cause, costs may be imposed upon him (*In re Morse*, 7 B. R. 56), the matter resting largely in discretion (§2[18]). The removal is an exercise of judicial discretion to be exercised only for cause (*In re Mallory*, 4 B. R. 153), and is not subject to review (*In re Adler Bros.*, 2 Woods, 571. See also *in re Perkins*, 5 Biss. 254; s. c. 8 B. R. 56), except when there is a clear abuse of discretion (*Ex p. Bates*, 21 L. J. Bank, 20; 16 Jurist, 459).

The statute provides that the court may remove the trustee "upon complaints of creditors" (§2[17]). The language is different from that used in the Act of 1867, which was that the court might "remove an assignee for any cause which, in the judgment of the court, renders such removal necessary or expedient" (Act of 1867, §18). Whether the intention of Congress was to limit the court to remove on the complaint of creditors only must be hereafter determined by the courts. It does not seem, however, that such was the intent, since it would result in depriv-

proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

SEC. 47. Duties of Trustees.¹—a Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon

ing the court to some extent of its jurisdiction in equity. Again, the provision of the present Act differs from that of the Act of 1867, only in enumerating persons on whose complaint the court may act. If such enumeration is to be construed as that of the specific powers of jurisdiction, then the court will have the authority it would have possessed had no enumeration been made (§2[17]). This would leave the jurisdiction of the court as to removals the same as it possessed under the act of 1867, in the construction of which it was held that the court might remove a trustee upon the complaint of the bankrupt (*In re McGlynn*, 2 Low. 127), following the English practice (*Ex p. Baker*, 2 Mont. D. & D. 60). It will be a ground for removal if the bankrupt improperly attempts to influence the election (*Ex p. Shaw*, 1 G. & J. 154), if the election is actually fraudulent (*Ex p. Morse*, 11 Jur. 482; *ex p. Carter*, 3 D. & J. 116), or, if because of the improper exclusion of a large number of creditors, the election expresses the wishes of a minority of the creditors (*Ex p. Edwards*, Buch. 411). There can be little question but that the court has authority to remove the trustee for misconduct or a breach of trust, and certainly so if he fails to exercise reasonable diligence in collecting the assets or disposing of the property (*In re Morse*, 7 B. R. 56), refuses to furnish information concerning the estate when a reasonable request is made (*In re Perkins*, 5 Biss. 254; s. c. 8 B. R. 56), holds preferred claims (*Ex p. Oakes*, 2 Mont. D. & D. 60). See also *in re Powell*, 2 B. R. 45), if he has occupied a fiduciary position leaving him liable to account to the estate (*In re Stuyvesant Bank*, 6 B. R. 272; *ex p. Lacey*, 6 Ves. 625), whenever his interests are in any way adverse to the estate (*Ex p. Holland*, 2 M. D. & D. 469; *in re Powell*, 2 B. R. 45; *ex p. Startees*, 12 Ves. 10), or when, without any fault on the part of the trustee, a disagreement arises between the trustee and creditors, or between the trustees themselves, when such removal promises to inure to the benefit of the estate (*In re Mallory*, 4 B. R. 153). Under the English practice, it was held that subsequent bankruptcy or insolvency was ground for removal (*Ex p. Copeland*, 1 Mont. & Ayr. 306; *ex p. Bousar*, 1 Mont. D. & D. 194). If the trustee ceases to have either a residence or an office in the district, the court should remove him (*Ex p. Gray*, 13 Ves. 274). The doctrine of laches applies to causes for removal of trustees, and if complaint is unreasonably delayed, the court is justified in declining to remove (*Ex p. Nash*, 1 Mont. 50).

¹For analogous provisions as to the first subdivision of this section, see R. S. §5062B; as to the third, R. S. §5059; as to the eighth, R. S. §5096, Act of 1867, §28; as to the eleventh, Rule XIX of orders in bankruptcy under the Act of 1867. See also §11 as to suits by and against the bankrupt and notes thereto.

property of such estates; (2) collect¹ and reduce to

¹The title to all the bankrupt's property vests in the trustee upon his appointment and qualification (§70), and it becomes his duty to take such steps as may be necessary to reduce the same to his possession. The term "property" has a broader significance as here used than that generally accorded it. It includes not only the tangible assets, but inchoate rights of every nature, as well as rights of action which pass to him as the representative of the creditors. (See §70 and notes) The trustee may with the approval of the court, when he cannot collect the assets on demand, submit to arbitration (§26) or compromise (§27). When neither of these methods will enable him to adjust differences, he may bring suit in his own name to possess himself of the property (*Dambmann v. White*, 12 B. R. 438; s. c. 48 Cal. 439; *Morse v. Gritman*, 10 B. R. 132; *Wheelock v. Lee*, 64 N. Y. 242; *Hastings v. Fowler*, 2 Ind. 216; *Wheelock v. Hastings*, 45 Mass. 504). A receiver who is appointed pending the appointment of a trustee must collect the assets the same as the trustee and may resort to the same legal remedies for that purpose (*In re Fixen & Co.* [D. C.], 96 Fed. Rep. 748). It is not proper for the trustee to sue unless the property he seeks to recover would constitute assets of the estate (*Dutcher v. Bank*, 12 Blatch. 435; s. c. 11 B. R. 457. See also *Sawyer v. Hoag*, 9 B. R. 145; s. c. 17 Wall. 610; s. c. 3 Bliss. 293), and should not sue unless he has on hand money to meet the expenses to be incurred (*Reade v. Waterhouse*, 10 B. R. 277; s. c. 12 Abb. Pr. [N. S.], 255; s. c. 52 N. Y. 587). Aside from instituting original suits, the trustee may prosecute or defend pending actions (§11), sue out writs of error to review judgments against the bankrupt rendered prior to adjudication (*Jenkins v. Bank*, 97 Ill. 568), and take such summary proceedings in the court of bankruptcy as may be proper (See §§2, 23 and notes). When he has once gained possession of property, the court of bankruptcy, on petition of the trustee, will enjoin one claiming to own it from asserting his claim in a State court (*Keegan v. King* [D. C.], 96 Fed. Rep. 758), as it will also do to prevent an officer of a State court from selling property in his possession under a decree obtained by fraud (*Southern Loan & Trust Co. v. Benbow* [D. C.], 96 Fed. Rep. 514). No pending suit should be continued by the trustee if it is not worth the expenses of the litigation (*Mutual Bed. Fund v. Bousieux*, 4 Hughes, 387; *Trader's Bank v. Campbell*, 14 Wall. 87).

As to the assets of partnership property when an individual of a firm becomes a bankrupt, the firm as such not becoming so, the trustee becomes a tenant in common with the bankrupt's partners, but is entitled only to the bankrupt's share after the solvent partners have settled up the partnership and satisfied such liens as they may have against the bankrupt's share (*Story of Partnership*, §375; *in re Shepard*, 3 B. R. 172; s. c. 3 Ben. 347; *Amsinck v. Bean*, 22 Wall. 395; s. c. 11 B. R. 495; s. c. 10 Blatch. 361; s. c. 8 B. R. 228; *Forsaith v. Merritt*, 3 B. R. 48; s. c. Lowell, 336; *Murray v. Murray*, 3 Johns. Ch. 60; *Ayr v. Brastow*, 5 Law. Rep. 498; *Talcott v. Dudley*, 5 Ill. 427). In settling the estate, if it becomes necessary to bring suit, the solvent partners should make the trustee a party (*Thompson v. Frere*, 10 East, 418; *Burt v. Mowd*, 3 Tyr. 569; *Cannon v. Wellford*, 22 Gratt. 195; *Coe v. Whitbeck*, 11 P. 42; *Halsey v. Norton*, 45 Mass. 703; *Peel v. Ringgold*, 6 Ark. 546). Should the solvent partner neglect to promptly and faithfully settle up the firm business, the court of bankruptcy, in the exercise of its equity jurisdiction, will aid the trustee (*McLean v. Ihnssen*, 1 West. L. J. 189; *Parker v. Muggridge*, 2 Story, 334; *Ayr v. Brastow*, 5 Law Rep. 498). The trustee is justified in putting partially manufactured property in a saleable condition, though if the expense of so doing is large, he should first obtain an order for that purpose (*Foster v. Ames*, 2 B. R. 455; s. c. 1 Lowell, 313). When it is clear that property which comes into the hands of the trustee did not belong to the bankrupt, he should surrender it to the lawful owner (*In re Noakes*, 1 B. R. 592).

money' the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; (3) deposit all money received by

¹In reducing the property to money, the trustee may sell subject to the approval of the court for such sum as he may be offered, and he may sell without the approval of the court when he realizes not less than seventy-five per cent. of its appraised value (§706). The section here referred to is the only provision in the present Act prescribing the method of disposing of the real and personal property belonging to the estate, though the manner is indicated in Rule XVIII. See also §574 which provides for fixing the value of securities held by secured creditors. As to the manner of selling under the former Act, see R. S. §§5062, 5062A, 5062B, 5063, 5064 and 5065. The trustee can sell the property wherever it is situated (*Oakey v. Corry*, 10 La. Ann. 502), but he can convey no title unless he follows the statute of bankruptcy in making the sale (*Joy v. Berdell*, 25 Ill. 537; *Wisner v. Brown*, 50 Mich. 553; *Gray v. Heslep*, 33 Mo. 238). As has been before stated, the character of the property which vests in the trustee is two fold, the title which the bankrupt had in the property and the rights of action which the creditors had. If the sale is of "all the trustee's right, title and interest in and to the property," the vendee will acquire all the rights of action which the trustee could have exercised, and may institute proceedings to set aside a prior conveyance for fraud (*Williams v. Vermeule*, 4 Sandf. Ch. 388), though he could not so act if he had acquired by the sale only such right, title and interest as the bankrupt had (*Baker v. Vining*, 30 Me. 121. See also *Glenney v. Langdon*, 98 U. S. 20). If there are no fraudulent conveyances or voidable preferences, then there are no rights in the creditors, and the sale will be of such rights as the bankrupt possessed, the purchaser taking the property subject to all existing liens and equities (*In re Stuyvesant Bank*, 10 B. R. 399; s. c. 12 Blatch. 179; *in re Wynne*, 4 B. R. 23; *Strong v. Clawson*, 10 Ill. 346). Dower rights are not divested by a trustee's sale, the court having no jurisdiction thereover (*In re Angier*, 4 B. R. 619; s. c. 10 A. L. Reg. 190; *in re Hester*, 5 B. R. 285; *Porter v. Lasear*, 109 U. S. 84; *in re Kelso*, 102 Pa. St. 7; *ex p. Bell*, 1 Glyn & J. 232; *in re Smith*, 5 Ves. 189; *Speake v. Kinard*, 4 Rich. [N. S.], 54. See also §8 as to dower). The trustee, by order of the court, can sell encumbered property free from liens (*In re Nat. Iron Co.*, 8 B. R. 422; *in re Pittlekow* [D. C.], 1 N. B. News, 234; s. c. 92 Fed. Rep. 901). The term "court" here used includes the referee (§1[7]), and he, too, has authority to order a sale so made (*In re Sanborn* [D. C.], 96 Fed. Rep. 551). The lien on the property so sold is not vitiated, but it attaches to the proceeds of the sale and should be so ordered by the court (*Southern Loan & Trust Co. v. Benbow* [D. C.], 96 Fed. Rep. 514). The order authorizing such a sale must be founded on a petition which sets forth all the facts, showing such sale to be for the best interests of all parties (*In re Schneff*, 2 Ben. 72; s. c. 1 B. R. 190; *Sutherland v. L. S. C. Co.*, 9 B. R. 298). The order should not be made if lienors will be injuriously affected (*Foster v. Ames*, 2 B. R. 455; s. c. 1 Lowell, 313). They should be given notice of the application to have the property sold free from encumbrances, otherwise their liens will be unaffected and the purchaser will take subject to them (*Ray v. Norseworthy*, 23 Wall. 128; s. c. 12 B. R. 145; *Factors' Ins. Co. v. Murphy*, 111 U. S. 738). The court will be justified in disapproving a sale and ordering a new one if it believes, whatever the showing, that a substantially larger price can be obtained (*In re O'Fallon*, 2 Dill. 548), or if it has been conducted to the prejudice of creditors (*In re Troy Woolen Co.*, 4 B. R. 629; s. c. 8 Blatch. 465). Under the present Act, the only person restricted in purchasing from the trustee is the referee before whom the estate is pending (§29[2]). Aside from the statute, the trustee cannot legally bid or purchase,

them in one of the designated depositories;¹ (4) disburse money only by check or draft on the depositories in which it has been deposited;² (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest;³ (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts;⁴ (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors;⁵ (9) pay dividends within ten days after they are declared by the referees;⁶ (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as

though under peculiar circumstances, with the consent of the creditors and an order of the court, he may do so (*Ex p. Bage*, 4 Madd. 459. See also 8 Ves. 351; 1 Glyn & J. 112). The bankrupt may purchase with money borrowed or acquired subsequently to his adjudication (*Arnold v. Leonard*, 20 Miss. 258; *Gates v. Fraser*, 9 Ill. App. 624).

¹It is the duty of the court to designate by order the bank in which the trustee shall deposit the moneys of the estate (§61).

²These checks or drafts must be signed by the trustee or the clerk and countersigned by the judge, or by a referee designated for that purpose (Rule XXIX).

³The accounts relating to the affairs of the bankrupt and the papers and records of the estate are open to reasonable inspection by all parties in interest (§49), and when so ordered by the court it will be an offense to disobey the order (§29-[3]). The provision of §29, however, is independent of that in this subdivision, under which the trustee must not only give the information, but he must not conceal facts which may lead creditors to act differently from what they might had they known all the facts. If the trustee misleads the creditors in not properly informing them as to their rights, he will be removed and, if necessary, the proceedings revised (*In re Perkins*, 8 B. R. 56; s. c. 5 Biss. 254).

⁴See §54 and notes as to the keeping of separate accounts relative to partnership and individual property.

⁵The trustee may be removed for failure to file any report required of him by this act (Rule XVII). See also §2(8).

⁶See §64 as to debts which have priority; §65 as to the declaration and payment of dividends; and §66 as to unclaimed dividends.

If a dividend be paid without an order of the court, the trustee must make good any loss resulting from such unauthorized payment (*In re Rude* [D. C.], 101 Fed. Rep. 805). The bankruptcy court will not enjoin the trustee from distributing assets of the estate to allow a contingent interest of a third person therein to mature into a vested interest, as the dower interest of a wife on the granting of a divorce (*Hawk v. Hawk et al.* [D. C.], 102 Fed. Rep. 679).

may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts;¹ and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.²

b Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

SEC. 48. Compensation of Trustees.³—*a* Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars.⁴

b In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered,

¹See Rule XVII as to the duties of trustee.

²See Rule XVII and §6 and notes as to exemptions; also §7(8) as to the necessity of the bankrupt's claiming the same in his schedule.

The trustee must deliver to the bankrupt his exemptions as soon as practicable, and has no right to delay so doing because the latter has concealed or fraudulently transferred property (*In re Park* [D. C.], 102 Fed. Rep. 602).

³For analogous provisions, see R. S. §§5099, 5127, 5127A, 5124; Act of 1867, §§28, 47; Act July 27th, 1868, Ch. 258, §2; Act of 1800, §§29, 47. See also Rule XXXV as to compensation of clerks, referees and trustees, and §512(2) as to when the trustee's fee is not collected from a voluntary bankrupt.

⁴If no substantial assets are disclosed by the schedules, no trustee need be appointed. If creditors insist upon an appointment, they must advance the statutory fees, or otherwise arrange for his compensation (*In re Levy* [D. C.], 101 Fed. Rep. 247). As to the commissions on sums to be paid as dividends, see notes to §402.

so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

c The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

SEC. 49. Accounts and Papers of Trustees.—*a* The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.¹

SEC. 50. Bonds of Referees and Trustees.²—*a* Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

b Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond.

¹For analogous provisions, see R. S. §5062B. See also §29(3) as to a refusal to allow a reasonable inspection, §472(5) as to the duty of the trustee to furnish information and Rule XVII as to the duties of trustees.

²For analogous provisions, see R. S. §§4995, 5036; Act of 1841, §9; Act of 1867, §§3, 13.

If the creditors do not fix the amount of the bond of the trustee as herein provided, the court shall do so.

d The court shall require evidence as to the actual value of the property of sureties.

e There shall be at least two sureties upon each bond.

f The actual value of the property of the sureties, over and above their liabilities and exemptions on each bond shall equal at least the amount of such bond.

g Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

h Bonds of referees, trustees and designated depositories shall be filed of record in the office of the clerk of the court, and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

i Trustees shall not be liable, personally or on their bonds, to the United States for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees.

j Joint trustees may give joint or several bonds.

k If any referee or trustee shall fail to give bond as herein provided, and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

l Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

m Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

SEC. 51. Duties of Clerks.¹—*a* Clerks shall respectively (1) account for, as for other fees received by them,

¹For analogous provisions, see Nos. 1 and 28 of the General Orders in Bankruptcy under law of 1867. See also Rule 1 as to the keeping of a docket, Rule II as to endorsements on papers filed with him, Rule III as to the teste of processes and the furnishing of them in blank to referees with seal and signature affixed, Rule X as to the clerk's authority to require indemnity for expenses and Rule XXIX as to authority to sign checks.

the clerk's fee paid in each case, and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt, which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain the money with which to pay such fees;¹ (3) deliver to the referees upon application all papers which

¹ See notes to § 52a.

It has been held by a district court under the present statute that the affidavit here specified cannot be taken as conclusive of the fact that the bankrupt is without and cannot obtain the money with which to pay the fees; that he should be examined by or under the direction of the referee on his appearance before him with regard to his means, the rule being in analogy with the common law, chancery and admiralty practice of allowing poor persons to sue without security for costs; that if he appears by counsel, he will be presumed to be able to pay the filing fees unless it appears that counsel is not being paid; and if he is earning \$30 a month, though exempt, he must pay out of that the amount provided by statute or have his petition dismissed (*In re Collier* [D. C., Tenn.], 1 N. B. News, 257; s. c. 93 Fed. Rep. 191). Judge Hanford of the district court of Washington declined to sign orders for discharge because the fees were not paid, and promulgated in his district the rule that while the clerk would file the petitions accompanied by the affidavit in this subdivision specified, yet the bankrupts would have to pay the necessary expenses as the case progressed, and before the final discharge, must pay the full amount of the filing fees or make a showing to the satisfaction of the court that by reason of ill health, or circumstances of peculiar misfortune he is a worthy object of charity (1 N. B. News, 376; 95 Fed. Rep. 120). A similar holding was made in Vermont (*In re Bean* [D. C.], 100 Fed. Rep. 262). The holding *in re Collier* and *in re Bean*, and the rule adopted by Judge Hanford, seem harsh and inharmonious with the intention of the statute so clearly expressed. Still, except as to the differences that may exist in judicial discretion and the shifting of the burden of proof upon the bankrupt, they seem to be within the provisions of subdivision four of Rule XXXV. Between that rule and the statute there is a wide difference. That the bankrupt may be subjected to an examination touching his means may not be questioned, but that an issue as to such means may be created, that the burden of proof may be shifted to the bankrupt and that he may in accordance with judicial discretion be obliged to pay the filing fees out of money earned after filing his petition, out of the amount allowed to him as an exemption or out of money borrowed for that purpose, is denied. The Supreme court has no authority to adopt a rule that perverts the clear intention of the statute. It is the function of that tribunal to construe—not to enact laws (U. S. Const., Art. III, § 1, Cl. 1). It may adopt "all necessary rules, forms, and orders as to procedure and for carrying this act into force and effect" and nothing more (§ 30). Recognizing this limitation, the circuit court of appeals, in *Sellers v. Bell*, 94 Fed. Rep. 801, fixed what may be considered the true rule in holding that a voluntary bankrupt who accompanied his petition with the prescribed affidavit, was not required to solicit gifts or loans from his friends for the purpose of paying the filing fees; that he was not required to pay the same out of his exemption; or out of money earned after the filing of his petition.

may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used;¹ (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.²

SEC. 52. Compensation of Clerks and Marshals.³—

a Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.⁴

b Marshals shall respectively receive from the estate when an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their service in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.⁵

¹See Rule XII(1) as to the delivery of papers in cases referred to the referee.

²A case is not concluded until the records in the case have been transmitted to the clerk by the referee (§39a[7]).

³For analogous provisions, see R. S. §§5124, 5125, 5127, 5127A, 5127B; Act of 1800, §§46, 47; Act of 1841, §13; Act of 1867, §§5, 47; Act of July 27th, 1868, Ch. 258, §2.

⁴This fee does not include copies of papers furnished to persons other than officers of the court (Rule XXXV[1]), nor when there are assets does the clerk necessarily lose the fee which the bankrupt may be excused from paying, as the court may order it paid out of the estate (Rule XXXV[4]). Only one filing fee is to be paid in cases where a copartnership is the bankrupt and separate discharges are granted to the individuals thereof, there being in that but one proceeding in bankruptcy (*In re Langslow et al.* [D. C.], 98 Fed. Rep. 869; *in re Gay et al.* [D. C.], 98 Fed. Rep. 870). It is different, however, where, in addition to the firm petition, the individuals file separate ones (*In re Barden* [D. C.], 101 Fed. Rep. 553).

⁵For analogous provisions, see R. S. §§5124, 5125, 5127, 5127A, 5127B; Act of 1800, §§46, 47; Act of 1841, §13; Act of 1867, §§5, 47; Act of July 27th, 1868, Ch. 258, §2. See also Rule X as to his authority to require indemnity for expenses, and R. S. §829 as to fees allowed marshals for their various services. The fees

SEC. 53. Duties of Attorney-General.—*a* The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates, and such other like information as he may deem important.¹

SEC. 54. Statistics of Bankruptcy Proceedings.—*a* Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.²

must be paid in advance if the marshal demands them (*Ray v. Knowlton*, 11 Biss. C. C. 360; *Duy v. Knowlton*, 14 Fed. Rep. 107). When the marshal is ordered to take possession of the bankrupt's property and hold the same until a trustee is appointed, he will be allowed out of the estate a reasonable compensation for his services in addition to the costs and expenses incurred (*In re Adams Sortorial Art Co.* [D. C.], 101 Fed. Rep. 215).

¹No former Act had provisions analogous to this section.

²No former Act had provisions analogous to this section.

CHAPTER VI.

CREDITORS.

SEC. 55. **Meetings of Creditors.**¹—aThe court shall cause the first meeting of the creditors of a bankrupt to be held not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.²

¹For analogous provisions, see R. S. §§5019, 5032, 5033, 5092, 5093, 5094; Act of 1800, §§6, 29, 30; Act of 1841, §7; Act of 1867, §§11, 12, 17, 26, 28.

²As to the notice of meetings required to be given creditors, see §58 and Rule XXI(2). The notice to creditors of the first meeting will be considered regular when prepared before the bankrupt's list of creditors is filed, if such list is not filed within the statutory time (*In re Schiller* [D. C.], 96 Fed. Rep. 400). The principal purpose of the first meeting is to elect a trustee, which should be done even though no claims are proven (*In re Cogswell*, 1 Ben. 388; s. c. 1 B. R. 62; *in re Annon*, 1 B. R. 123. See also §44 as to the appointment of trustees). The language of §44 seems to require the creditors to appoint a trustee whether there be assets or not, the object under such circumstances being to search for assets (*In re Graves*, 5 Law Rep. 25; s. c. 1 N. Y. Leg. Obs. 213). It is not necessary that any particular number of creditors should be present in order to act. A single creditor whose claim has been allowed, will constitute a quorum, and he alone may vote and elect the trustee (*In re Haynes*, 2 B. R. 227). But if the schedule discloses no assets, and no creditor appears at the first meeting, then and only then may the court, on reciting such facts, order that no trustee be appointed (Rule XV). This order is founded on the conclusion that the bankrupt has, in fact, no property, and that the creditors, so believing, feel no interest in the proceedings. If, however, such an order be made, and the referee or any of the creditors thereafter discover assets, a trustee may then be appointed (Rule XV; *in re Smith* [D. C.], 93 Fed. Rep. 791). The referee has no right to in any manner influence the choice of a trustee, and if he does so, the case may, for that reason, be transferred to another referee (*In re J. O. Smith*, 1 B. R. 243).

b At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.¹

c The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act.

d A meeting of creditors, subsequent to the first one, may be held at any time and place when all the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

e The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

f Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.²

¹At the first meeting any creditor whose debt is provable can examine the bankrupt, though he has not made formal proof of his claim (*In re Walker* [D. C.], 96 Fed. Rep. 550). See also as to examination of the bankrupt §7(9), and as to any person including the bankrupt, §21a together with notes to these sections. When the allowance of a claim is opposed, the referee should decide the question involved before the election of a trustee, that the creditor, if his claim be allowed, may vote, and an adjournment from day to day should be taken for this purpose, such adjournments being regarded as the "first meeting" (*In re Phelps, Cadwell & Co.*, 1 B. R. 525). Under the former act, it was held not necessary to postpone the election of the trustee until opposed claims were decided (*In re Northern Iron Co.*, 14 B. R. 356; *in re Jackson*, 14 B. R. 449; *in re Lake Superior S. C. R.*, 7 B. R. 376), but that was under a statute which expressly provided that the proof of a disputed claim might be postponed until the assignee was chosen (Act of 1867, §13), while the present Act contemplates a speedy disposition of such objections (§57f).

²It is the duty of the trustee at this meeting to lay before the creditors detailed statements of the administration of the estate (§47a[7]).

SEC. 56. Voters at Meetings of Creditors.¹—*a* Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.²

b Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.³

¹For analogous provisions, see R. S. §§5034, 5035; Act of 1867, §§13, 18 See also §44 and notes, as to the appointment of trustees by the creditors.

²Any one who owns a demand or claim provable in bankruptcy is a creditor, and this word includes any duly authorized agent, attorney, or proxy (§1[9]), either of whom may vote at creditors' meetings. The expenses of an attaching creditor is a provable claim when his lien is dissolved by an adjudication in bankruptcy, though not entitled to priority of payment (*In re Allen* [D. C.], 96 Fed. Rep. 512). Under the former Act it was held that attorneys in fact, on filing a duly executed power of attorney with the court, could vote, but not attorneys at law (*In re Purvis*, 1 B. R. 163). This, however, was under a statute which did not include the agent, attorney, or proxy in the meaning of creditor as the present statute does. The only requirement of the present statute is that the agent, attorney or proxy be "duly authorized." When it is practical each of these should be authorized by a power of attorney "proved or acknowledged before a referee, or a United States commissioner, or a notary public" (Rule XXI[5]). This rule was formulated, evidently, without reference to proof of claims of foreign creditors. As to such creditors the necessary oath may be taken before any diplomatic or consular officer of the United States in any foreign country (§20[3]; *in re Sugenhimer* [D. C.], 1 N. B. News, 59; s. c. 91 Fed. Rep. 744). When the circumstances are such that a power of attorney cannot be obtained in time, an attorney at law may undoubtedly act at the creditors' meetings in behalf of his client on such proof, if any, as would be required of him in a United States court of equity (See Rule XXXVII). It is only in exceptional cases that an attorney at law must make proof of his authority, for that is ordinarily presumed (*Hamilton v. Wright*, 37 N. Y. 502; *Osborn v. Bank*, 9 Wheat. [U. S.], 738; *Hill v. Menderhall*, 12 Wall. [U. S.], 453; *Norberg v. Heminan*, 59 Mich., 210). This presumption will continue until the attorney's authority is denied and the party so questioning it must show facts tending to prove a want of such authority before the attorney at law will be required to make proof of it (4 Duer 632, 17 Cal. 431, 22 Wis. 207). In voting, a copartnership or a corporation is considered as a single creditor, the former voting by either of its members (*In re Purvis*, 1 B. R. 163), and the latter by its proper officer or any duly authorized person (*Ex p. Bank of England*, 1 Swanst. 10), though an officer of a bankrupt corporation may vote for the choice of a trustee of the corporation if he is the owner of an individual claim (*In re Northern Iron Co.*, 14 B. R. 356).

³When a partnership and all its members are in bankruptcy, and a creditor holds security on both the property of the partnership and the individual property

SEC. 57. Proof and Allowance of Claims.¹—a Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and if so what securities are held therefore, and whether any, and if so what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.²

of one of the partners, the value of the securities on the individual property of the partner need not be deducted in ascertaining the voting power of the creditor, but only the value of the securities on the partnership property need be deducted (*In re Coe, Powers & Co.* [D. C.], 1 N. B. News, 294).

¹For analogous provisions, see R. S. §§5077 to 5085 inclusive; Act of 1800, §§16, 37, 39; Act of 1841, §§5, 7; Act of 1867, §§22 as amended by Act of July 27, 1868, 23, 24. See also §55 as to the proof of claims of a partnership estate against an individual estate, and *vice versa*; §20 and Rule XXI(5) as to persons before whom oaths may be taken in making the affidavit as proof of claims; §63 as to debts which may be proved; Rule XX as to the filing of papers after reference; Rule XXI as to proof of debts; Rule XXVII as to review of referee's action by the judge; and Rule XXVIII as to the redemption of property and compounding of claims.

²All claims must be formally proved and allowed before a dividend can be paid on them (*In re Bittel*, 2 B. R. 391), and such proof may be made by the actual owner though another has taken a note therefor. This may be done by proving the note or the account (*In re Derby* [C. C. A.], 102 Fed. Rep. 808). No proof can be made of an unliquidated demand until the same has been liquidated in such manner as the court may direct (§63b; *in re Heinsfurter* [D. C.], 97 Fed. Rep. 198). The decision of the referee on the allowance or rejection of a claim, when based upon a question of fact, will not be disturbed by the judge unless manifestly contrary to the weight of evidence (*In re Rider* [D. C.], 96 Fed. Rep. 811). The creditor is not entitled to have the evidence, when contested by the trustee, weighed or considered by a jury (*In re Christensen* [D. C.], 101 Fed. Rep. 243), though the court may allow a jury trial in its discretion (*In re Rude* [D. C.], 101 Fed. Rep. 805). In involuntary proceedings, an adjudication cannot be made without a finding by the court that the petitioners have provable claims. Still, this finding will not serve the purpose of the formal proof and allowance required (*In re Cornwall*, 9 Blatch. 114; s. c. 6 B. R. 305). The consideration on which a demand is based should be itemized as fully as a bill of particulars (*In re Elder*, 3 B. R. 670; s. c. 1 Saw. 73; *in re Murrell Scott* [D. C.], 1 N. B. News, 326; s. c. 93 Fed. Rep. 418), and if it be against a firm, that fact should be made to clearly appear by stating the firm name and the names of the individuals composing it (*In re Walton*, Deady, 510). The proof of a claim may be made by the creditor, his agent or attorney (§1[9]; *in re Watrous*, 14 B. R. 258; *in re Whyte*, 9 B. R. 267; *McKinsey v. Harding*, 4 B. R. 39). Persons acting in representative capacities, as partners, assignees, guardians, executors or administrators, may make proof of the claims due them in such capacities (*In re Barrett*, 2 B. R. 533; *in re Republic Ins. Co.*, 3 Biss. 452; s. c. 8 B. R. 197; *in re Corn Exchange Bank*, 15 B. R. 216; *in re Murdock*, 3 B. R. 146; s. c. 1 Lowell, 362; *ex p. Davenport*, 1 Low. 384).

b Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.¹

c Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee if the case has been referred.

d Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.²

¹Notwithstanding a copy be left on file, the trustee may require the production of the original instrument when the dividend is paid that the same may be thereon endorsed (*In re Emison*, 2 B. R. 595; *in re McNair*, 2 B. R. 219). If such instrument cannot be produced, are cord of that fact may satisfy the purpose (*In re Derby* [C. C. A.], 102 Fed. Rep. 808).

²The trustee, the bankrupt or any creditor may object to the allowance of claims (*In re Patterson*, 1 B. R. 100; *in re Jones*, 2 B. R. 59). The claims should be allowed at the first meeting of the creditors (§556), unless the same for good reason and for the benefit of the estate be postponed. All claims ought to be examined by the bankrupt, and the court may require him to do so (§7[3]). The allowance of a claim should not be postponed unless there exists in the mind of the court a reasonable and substantial doubt resulting from a judicial consideration (*In re Jackson*, 14 B. R. 440; *in re North'n Iron Co.*, 14 B. R. 356). This doubt can arise only by opposition and the introduction of evidence that destroys the effect of the creditor's *prima facie* case made in accordance with paragraphs *a* and *b*, the burden of establishing the claim being always with the creditor (*In re Sumner* [D. C.], 101 Fed. Rep. 224). Where the claim is by a voluntary bankrupt's attorney for fees in connection with the case, the referee may suspend action thereon for a reasonable length of time after which he must decide on the evidence before him (*In re Dreeben* [D. C.], 101 Fed. Rep. 110). All persons proving their claims subject themselves to the jurisdiction of the court whether they reside within or without the district (*In re Kyler*, 2 Ben. 414). Where a claim or any part of it is tainted with fraud, the whole claim should be disallowed (*In re Elder*, 1 Saw. 73; s. c. 3 B. R. 670). Whenever a judgment debt is presented for allowance, the creditors of the bankrupt estate may show by any appropriate evidence that the judgment is void or voidable because of fraud or irregularity (*In re Fowler, ex p. O'Neil*, 1 B. R. 677; s. c. 1 Low. 161; *Downe v. Fuller*, 2 Met. 135; *Pierce v. Jackson*, 6 Mass. 244). Under the English practice in bank-

e Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.¹

f Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.²

ruptcy, inquiry will be made into the consideration of any judgment sought to be proved against a bankrupt estate, but the extent of this inquiry seems only to be to re-examine judgments at law and grant new trials or restrain executions (*ex p. Mudie*, 3 M. D. & DeG. 66; *ex p. Bryant*, 1 V. & B. 211; *ex p. Mason*, 2 Dea. 245; *ex p. Prescott*, 1 M. D. & DeG. 199)

¹A secured creditor includes one who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets (§1[23]). If the security held be on property of one other than that of the bankrupt, the creditor may prove his entire claim, receive his dividend, and enforce the balance out of the security (*In re Anderson*, 12 B. R. 502; *ex p. Todd*, 2 Rose, 202; *ex p. Taylor*, 3 Jur. N. S. 753; *ex p. Burn*, 2 Rose, 55; *in re Dunkerson*, 12 B. R. 413; *in re Broich*, 15 B. R. 11; *ex p. Leers*, 6 Ves. 644; *in re Cram*, 1 B. R. 504). It is of no consequence that the security may be on the individual property of the members of a firm as security for the firm debt—the rule still applies (*Ex p. Graves*, 2 Jur. N. S. 651; *ex p. Peacock*, 2 G. & J. 67; *in re Howard, Cole & Co.*, 4 B. R. 571; *in re Bigelow & Kellogg*, 2 B. R. 371; *in re Farnum*, 6 Law. Rep. 21. See also *Borden v. Cuyler*, 10 Cush. 478; *Mead v. Bank*, 2 B. R. 178; s. c. 6 Blatch. 180; *in re Stephenson*, 9 B. R. 256; *Emery v. Canal Bank*, 7 B. R. 217; *in re Bradley*, 2 Biss. 515; *Stevenson v. Jackson*, 9 B. R. 255; *in re Comstock & Co.*, 12 B. R. 110). In proving a secured claim the fact of the security should be stated, otherwise, as a general rule, the failure will amount to a surrender of the security, the creditor being deemed to have elected to prove his claim as unsecured (*In re Bloss*, 4 B. R. 147; *Heard v. Jones*, 15 B. R. 402; *ex p. Solomon*, 1 G. & J. 25; *Stewart v. Isidor*, 1 B. R. 485; *Hatch v. Seely*, 13 B. R. 380; *ex p. Downs*, 1 Rose, 96; *in re Brand*, 3 B. R. 324; *in re Granger*, 8 B. R. 30; *ex p. Hornby*, Buch. 351), though it will not of itself, without proceedings by the trustee for that purpose, operate as a discharge of a mortgage (*Cook v. Farrington*, 104 Mass. 212). If the failure to mention the security was inadvertent, the court will generally allow the proof made to be expunged, if no party will be thereby injured (*In re Hubbard*, 1 Low. 190; s. c. 1 B. R. 679), and in so doing may impose terms within its discretion (*In re Parkes*, 10 B. R. 82. See also *in re Jaycox & Green*, 8 B. R. 241; *in re Clark & Bininger*, 5 B. R. 255; *Greigson v. Gerard*, 4 T. & C. [N. Y.], 419; *ex p. Davenport*, M. D. & D. 313; *in re McConnell*, 9 B. R. 387). When the security is held by an indorser or a person secondarily liable, the creditor need not prove as a secured creditor to retain his rights against the indorser (*Merchants' Bank v. Comstock*, 55 N. Y. 24).

²The fact that the proof of a claim was verified before the creditor's attorney is no ground for objecting to it (*In re Kimball* [D. C.], 100 Fed. Rep. 777).

g The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.¹

¹See §60 as to preferred creditors. The provision of this paragraph differs materially from that of the prior Act, which provided that any person who had accepted a preference, having reasonable cause to believe that the same was made or given by the debtor contrary to the bankruptcy law, should not "prove the debt or claim on account of which the preference was made or given" until he had surrendered the same (Act of 1867, §23). Under that statute, it was held that where the creditor had separate and distinct claims, he could prove as to all except that or those on which he had received a preference without surrendering (*In re Richter*, 1 Dill. 544; s. c. 4 B. R. 221. See also *in re Jordan*, 9 B. R. 416). The language of the present statute will warrant, and has been construed as requiring, a disallowance of any and all claims which a creditor who has received a preference may hold, whether the claims be separate and distinct, unless he surrender the preference (*In re Conhaim* [D. C.], 97 Fed. Rep. 923; *in re Rogers Milling Co.* [D. C.], 102 Fed. Rep. 687). The surrender must be made before the debt will be allowed, even though the creditor contends that it is void (*In re Leeman* [D. C.], 1 N. B. News, 331), or claims that he did not know at the time of the transfer that it amounted to or was intended as a preference, the effect of the transfer rather than the knowledge or intention of the parties being the gist of the statute (*In re Ft. Wayne Electric Corp.* [D. C.], 95 Fed. Rep. 803; s. c. [C. C. A.], 99 Fed. Rep. 400; *in re Conhaim* [D. C.], 97 Fed. Rep. 923; *Strobel & Wilken Co. et al. v. Knost et al.* [D. C.], 99 Fed. Rep. 409; *in re Klingman* [D. C.], 101 Fed. Rep. 691; *in re Sloan* [D. C.], 102 Fed. Rep. 116; *in re Fixen et al.* [C. C. A.], 102 Fed. Rep. 295). This has been held not to be true, however, in cases where the alleged preferences were payments made on a running account in the ordinary course of business, where the evidence failed to show that the bankrupt was insolvent at the times they were so made (*In re Alexander et al.* [D. C.], 102 Fed. Rep. 464). The same is true when property sold to the bankrupt is taken in replevin by the vendor on the ground of fraudulent representations as to solvency (*In re Heinsfurter* [D. C.], 97 Fed. Rep. 198). Where a judgment creditor caused execution to be levied within two months before the filing of the petition in bankruptcy, and it was agreed between him and the petitioning creditors that the sheriff should sell the property, deduct the cost of sale and turn balance over to the trustee, the petitioning creditors were estopped from saying the judgment creditor must refund such costs before proving his claim (*In re Mayer* [D. C.], 97 Fed. Rep. 324). The surrender must be to the trustee, not to the bankrupt (*In re Currier*, 13 B. R. 68), but the courts are not in unison as to what will amount to such a surrender as will entitle the creditor thereafter to prove his claim. Some hold that it must be entirely voluntary without contesting the trustee's title thereto (*In re J. Lee*, 14 B. R. 89), and especially before the trustee has secured a judgment for the recovery thereof (*In re Tonkin*, 4 B. R. 52; *in re Richter*, 4 B. R. 221; s. c. 1 Dill. 544. See also *in re Cramer*, 13 B. R. 225; *in re S. Leland*, 9 B. R. 209). Other courts take the position that the surrender will meet the requirement of the statute if made by the creditor and accepted without conditions by the trustee before judgment and during the pendency of a suit for the recovery thereof (*In re J. Riorden*, 14 B. R. 332; *in re Montgomery*, 3 Ben. 565; s. c. 3 B. R. 137, 429; *in re Kipp*, 4 B. R. 593; *in re Tonkin*, 4 B. R. 52; *in re C. A. Davidson*, 3 B. R. 418; *in re Scott & McCarty*, 4 B. R. 414). The circuit court for the Eastern District of Wisconsin goes still further in holding that the creditor may surrender the preference even after an opinion has been given by the court on a finding of facts, though before the actual entry of judgment (*Burr v. Hopkins*, 12 B. R. 211). What seems to be the prac-

h The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

i Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.¹

j Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty of forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.²

k Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.³

tice most in accord with the true intent of the statute and the principles of equity is laid down in *Zahm v. Fry*, 9 B. R. 546 and *Hood v. Karper*, 5 B. R. 358, where it was held that if there was no actual fraud on the part of the preferred creditor, he might pay the costs and expenses of the suit, surrender his preference and be allowed to prove his claim.

¹If the claim could not be proved by the creditor because of his having accepted and failed to surrender a preference, the surety cannot prove it (*In re Ayers*, 6 Biss. 48). And where a surety has made a partial payment on a secured claim, the right to prove the entire claim is in the creditor rather than the surety (*In re Heyman* [D. C.], 95 Fed. Rep. 800).

²See §17 as to debts which are not affected by a discharge, §64 as to those which have priority, and §68 as to set-offs.

³When a re-examination of a claim is desired, the trustee or any creditor may apply by petition to the referee before whom the case is pending therefor; the referee shall order a hearing of which due notice should be given the creditor (Rule XXI[6]). If the petition for reconsideration and disallowance does not aver the essential facts with sufficient particularity, the proper method of objecting

l Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

m The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.¹

SEC. 58. Notice to Creditors.²—*a* Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors,³ unless they waive notice in writing, of (1)

to it is by motion for a more specific statement (*In re Ankeny* [D. C.], 100 Fed. Rep. 614). To correct errors, it is discretionary with the court to allow the creditor to have his proof of claim expunged, if no one will be thereby injured (*In re Hubbard*, 1 Low. 190; s. c. 1 B. R. 679; *in re Parkes*, 10 B. R. 82), after which the proper practice is to prove the claim anew (*In re Montgomery*, 3 Ben. 565; s. c. 3 B. R. 429). When the application for a re-examination is made by the trustee or a creditor, the original allowance would seem to establish a *prima facie* case, leaving the burden of proof with the petitioner. For cause arising after the allowance of a claim, the court may expunge or dismiss it (*In re Loring*, 1 Holmes, 483), though not without due notice to the creditor whose claim is to be affected (Rule XXII[6]). Any party feeling himself aggrieved by the final action of the court touching a claim, may have the same reviewed on appeal (§25a[3]. See also §25b).

¹The provision of this paragraph that debts "shall not be proved subsequent to one year after adjudication" is an absolute prohibition (*Bray et al. v. Cobb et al.* [D. C.], 100 Fed. Rep. 270).

²For analogous provisions, see R. S. §§5019, 5094, 5096, 5102, 5109, 5103A; Act of 1800, §29; Act of 1841, §§4, 9; Act of 1867, §§11, 17, 27, 28, 29.

³The notice will also be sent to any place of address designated by the post-office box or street number, which the creditor, in a request filed with the referee,

all examinations of the bankrupt;¹ (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts;² (3) all meetings of creditors; (4) all proposed sales of property;³ (5) the declaration and time of payment of dividends;⁴ (6) the filing of the final

may appoint (Rule XXI[2]). Although the statute provides that the creditors shall have notice, yet, the proceedings being so far *in rem*, actual notice to the creditors is not essential to the jurisdiction of the court (*Rayl v. Lapham*, 27 Ohio St., 452; s. c. 15 B. R. 508; *Thurmond v. Andrews*, 13 B. R. 157; s. c. 10 Bush [Ky.], 400; *Platt v. Parker*, 13 B. R. 14; *Heard v. Arnold*, 15 B. R. 543; s. c. 56 Geo. 570; *Pattison v. Wilbur*, 10 R. I. 448; s. c. 12 B. R. 193; *Williams v. Butcher*, 12 B. R. 143; *in re Archenbrow*, 11 B. R. 149; *Payne v. Able*, 4 B. R. 220; s. c. 7 Bush [Ky.], 344; *Hill v. Robbins*, 22 Mich., 475; *Symonds v. Barnes*, 6 B. R. 377; *Corey v. Ripley*, 4 B. R. 503; *in re Rudnick Bros.* [D. C.], 1 N. B. News, 276; s. c. 93 Fed. Rep. 787).

¹As to examinations of the bankrupt, see §7(9) and notes. An involuntary bankrupt may be ordered before the referee for examination before the first meeting of creditors or the appointment of a trustee, and if such examination is limited to obtaining information on which to prepare schedules, notice thereof need not be given to creditors (*In re Franklin Syndicate Co.* [D. C.], 101 Fed. Rep. 402). An objection to the regularity of the first meeting of creditors on the ground that the notices relative thereto were prepared before the bankrupt's list of creditors was filed will not be sustained where such list was not filed within the statutory time (*In re Schiller* [D. C.], 96 Fed. Rep. 400). The examination of the bankrupt at the first meeting of the creditors, under §7(9), is mandatory, over which the court has no discretion. The language of that section, however, authorizes the court to require the bankrupt to submit to other examinations. These other examinations, subject to the ten days notice provided for in this subdivision of the section, may be fixed, in the discretion of the court, for any time during the pendency of the proceedings (*In re Price* [D. C.], 1 N. B. News, 131; s. c. 91 Fed. Rep. 635; s. c. 92 Fed. Rep. 987; *in re Baum*, 1 B. R. 7; *in re Brandt*, 2 B. R. 215; *in re Mawson*, 1 B. R. 271; *in re Seckendorf*, 1 B. R. 626; *in re Vogel*, 5 B. R. 396; *in re Bromley*, 3 B. R. 686).

²The notices required by this subdivision cannot be given until the applications for confirmation of a composition or a discharge have been filed, and the place and date of hearing fixed in accordance with §12c and §14d. The published and mailed notice of the application for a discharge should contain a notice of the examination of the debtor to avoid a further notice to all creditors in case such an examination is allowed (*In re Price* [D. C.], 1 N. B. News, 131; s. c. 91 Fed. Rep. 635; s. c. 92 Fed. Rep. 987). When specifications in opposition to a discharge have been filed, the same cannot be withdrawn and the discharge granted without notice of the withdrawal to such other creditors as have relied on the specifications so filed (*In re Diets* [D. C.], 97 Fed. Rep. 563).

³As to the sale of the real and personal property of the bankrupt, see §70b and Rule XVIII.

⁴See §39(1) as to the duty of the referee to declare dividends; §47(9) as to the payment thereof by the trustee; §65 as to the *per centum* thereof, the time of declaration and rights of creditors therein; §66 as to the distribution of unclaimed dividends, and Rule XXI(4) relative to the payment thereof to persons contingently liable for the bankrupt.

accounts of the trustee, and the time when and the place where they will be examined and passed upon;¹ (7) the proposed compromise of any controversy,² and (8) the proposed dismissal of the proceedings.³

b Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.⁴

c All notices shall be given by the referee, unless otherwise ordered by the judge.

SEC. 59. Who may File and Dismiss Petitions.⁵—

a Any qualified person may file a petition to be adjudged a voluntary bankrupt.⁶

¹The trustee must make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors (§47[8]). This, as well as all other of the trustee's accounts, must be referred to the referee for audit, unless otherwise specially ordered by the court (Rule XVII).

²See §27 as to when the trustee may compromise a controversy.

³No petition in bankruptcy can be dismissed by consent or for want of prosecution until after notice to the creditors (§59g), though when more than one is filed against the same bankrupt, the court may order them consolidated and one hearing will serve for all (Rule VII).

⁴As to the designation of newspapers in which notices must be published, see §28.

⁵For analogous provisions, see R. S. §§5021, 5044; Act of 1800, §§1, 2; Act of 1841, §7; Act of 1867, §§11, 39. See also Rule III as to issuance of process; Rule IV as to the conduct of proceedings; Rule V as to the frame of petitions; Rule VI as to petitions filed against the same party in different districts; Rule VII as to the priority of petitions when two or more are filed against the same party; Rule VIII as to proceedings in partnership cases; Rule XI as to amendments of the petition and schedules; Rule XXVII as to review of the referee's orders by the judge; §3 as to acts of bankruptcy, and §4 as to who may become bankrupts.

⁶Any person who owes debts, except a corporation, is qualified to file a voluntary petition in bankruptcy (§4a and notes), and State courts cannot enjoin him from so doing (*Filligin v. Thornton*, 49 Geo. 384; s. c. 12 B. R. 92). The petition must be filed in the district where the alleged bankrupt has had his residence or domicile for the greater portion of the preceding six months (See §2[1] and notes thereto). It may be amended on the order of the court, obtained on application duly made (*In re Lange* [D. C.], 97 Fed. Rep. 197), its filing date, where no adjudication was had on the first, being that of the amended petition (*In re Washburn* [D. C.], 99 Fed. Rep. 84). It may also be amended as to immaterial matters requiring a *nunc pro tunc* amendment (*In re Meyers* [D. C.], 97 Fed. Rep. 757). Where a partnership petition is filed, both in the name of the partnership and its individuals, accompanied by firm and individual schedules, it is unnecessary for

b Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over;¹ or if all of the creditors of such person are less than twelve in number,² then one of

each individual to file an individual petition in order to be discharged of individual debts (*In re Gay et al.* [D. C.], 98 Fed. Rep. 870). The fact that the attorney who represented the petitioner was not admitted to the U. S. courts is no ground for vacating an adjudication, it not being jurisdictional (*In re Kindt* [D. C.], 98 Fed. Rep. 867). Whether one can file a voluntary petition after an involuntary one has been filed against him is open to some doubt, though the weight of authority favors the affirmative. Under the Act of 1841, the right to do so was sustained (*In re Canfield*, 1 N. Y. Leg. Obs. 234; s. c. 5 Law. Rep. 415), though under that of 1867, it was denied (*In re Stewart*, 3 B. R. 108), and later tolerated (*In re Davidson*, 3 B. R. 418). The right to simply file a voluntary petition is not limited by the contingency of an involuntary one being pending; but, unless there is some substantial end to be reached, the court in the exercise of its general jurisdiction in bankruptcy may and should stay the further proceedings under one or the other of the petitions, order their consolidation, or impose such terms on a continuation of those subsequently filed as will save the estate from the expenses of proceedings under the different petitions. Such is the practice contemplated under the present Act when two or more petitions are filed "against a common debtor" (Rule VII). The "common debtor" here mentioned includes a person who has filed a voluntary petition (§1a[1]). As a rule, it is of little importance whether the proceedings have a voluntary or an involuntary character, and both may exist in the proceedings under one petition (*In re Murray* [D. C.], 96 Fed. Rep. 600).

¹In computing the number of creditors and the amount of debts, a debt sought to be paid by an invalid transfer may be included (*In re Tierre* [D. C.], 1 N. B. News, 402; s. c. 95 Fed. Rep. 425). When the petition is against a partnership, a debt due by a partner to the firm is not to be counted, though if the petition be against an individual of a firm, both his individual and firm debts are to be reckoned (*In re Lloyd*, 15 B. R. 257). In States where enforceable debts are recognized as between husband and wife, the latter may be a petitioning creditor and her claim used in computing the amount of debts (*In re Novak* [D. C.], 101 Fed. Rep. 800). An involuntary petition cannot be filed against a corporation that is not "engaged principally in [1] manufacturing, [2] trading, or [3] mercantile pursuits" (§4b), incorporated insurance companies not being within the statute (*In re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co.* [D. C.], 96 Fed. Rep. 756). Involuntary petitions, it must be remembered, cannot be filed at all unless the person against whom the adjudication is sought has committed an act of bankruptcy (§3), and has an outstanding indebtedness of at least one thousand dollars (§4b). In computing this amount, claims of creditors to whom fraudulent preferences have been given should be included (*In re Tierre* [D. C.], 95 Fed. Rep. 425; s. c. 1 N. B. News, 402).

²When the petition is filed by one creditor, he should allege that all the creditors of the debtor are less than twelve in number, for this allegation in such a petition is jurisdictional (*In re Scammon*, 6 Biss. 130; s. c. 10 B. R. 66. *Contra*, in *re Jewett*, 2 Low. 393), and he can do this upon information and belief (*In re Scammon*, 10 B. R. 66; s. c. 6 Biss. 130; *In re Mann*, 14 B. R. 572; s. c. 13 Blatch. 401; s. c. 51 How. Pr. 174). One may calculate the amount of his claim by adding the interest to the principal (*Sloan v. Lewis*, 22 Wall. 150; s. c. 12 B. R. 173),

such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.¹

and by computing both the debts which are and those which are not due (*In re Alexander*, 4 B. R. 178; s. c. 1 Low. 470; *Linn v. Smith*, 4 B. R. 46), both classes being provable (§63). If this is not enough, he may buy up claims to make the amount required by the statute (*In re Shouse*, Crabbe, 482; *in re Woodford & Chamberlain*, 13 B. R. 575). See also *in re Beddingfield* [D. C.], 1 N. B. News, 385; s. c. 96 Fed. Rep. 190, where the court expresses a grave doubt as to whether claims so purchased may include a transfer of taxes. The point was not decided, being rendered unnecessary by additional claims of intervening creditors. It does not seem to be necessary that the petitioner's debt be owned by him at the time the act of bankruptcy alleged in the petition was committed (*Phelps v. Clasen*, 3 B. R. 87; s. c. Wool. 204).

¹Relative to the filing of schedules in involuntary proceedings, see §7(8) as to the bankrupt's duty in that behalf, §39(6) as to the referee's duty, and Rule IX as to that of the petitioning creditors.

Where the petition is filed against a partnership, it is not sufficient to allege that the partnership is insolvent, when insolvency is essential, but there should be an averment as to the solvency or insolvency of each of the partners (*In re Blair et al.* [D. C.], 99 Fed. Rep. 76). When a petition in involuntary bankruptcy has been collusively dismissed without due notice to other creditors than those joining in the petition, after the time for intervening has expired, the creditors affected thereby injuriously may file a new petition and will not be estopped by the judgment of dismissal (*Neustadter et al. v. Chicago Dry Goods Co.* [D. C.], 96 Fed. Rep. 83). When one furnishes money to another to carry on business, but no actual partnership exists, it is sufficient to file a petition against the ostensible owner of the business (*In re Kenney* [D. C.], 97 Fed. Rep. 554).

When a corporation is one of the petitioning creditors, an officer of the corporate body may sign the corporate name to the petition without any action by the directors instructing or authorizing him so to do (*In re Summers* [D. C.], 1 N. B. News, 266, 267). The mere fact that one may have a claim against the bankrupt is not in itself enough to enable him to become a petitioner in involuntary proceedings. He must be a creditor within the meaning of §1(9)—that is, he must own a demand provable in bankruptcy. (See §63 as to provable debts.) An unliquidated claim (*In re Brinckman* [D. C.], 103 Fed. Rep. 65), or one barred by the statute of limitation is not such a demand (*In re Realer* [D. C.], 1 N. B. News, 280; s. c. 95 Fed. Rep. 804; *in re Lipman* [D. C.], 1 N. B. News, 310; s. c. 94 Fed. Rep. 353; *in re Kingsley*, 1 B. R. 329; s. c. 1 Low. 216; *in re Hardin*, 1 B. R. 395; *in re Noeson*, 12 B. R. 422; s. c. 6 Biss. 443; *in re Reed*, 11 B. R. 94; s. c. 6 Biss. 250; *in re Cornwall*, 6 B. R. 305; s. c. 9 Blatch. 114). This is also the English doctrine (*Ex p. Dewdney*, 15 Vesey, 479; *in re Clendening*, 9 Irish Eq. R. N. S. 287). It is based on the conclusion that where a statute bars or limits an action in one jurisdiction, it so operates in all others. This doctrine, however, is not without exception, there being two cases to the contrary, though under a State statute which provided that the bar would be considered waived unless pleaded as a defense (*In re Ray*, 1 B. R. 203; s. c. 2 Ben. 53; *in re Sheppard*, 1 B. R. 439; s. c. 7 A. L. Reg. 484). Whether the filing of a petition in bankruptcy suspends the statute of limitation seems to be unsettled, there being authority favoring (*In re Eldridge*, 12 B. R. 540; *in re Wright*, 6 Biss. 317) and opposing the question (*Nicholson v. Murray*, 5 Saw. 320; s. c. 18 B. R. 469).

Again, a creditor who, though he owns a provable claim, will be estopped from filing an involuntary petition if he gave his express or implied consent to the act of bankruptcy on which he founds his petition, such as a general assignment or

c Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.¹

d If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than

preferential transfer (*In re Israel*, 12 B. R. 204; s. c. 3 Dill. 511; *in re Schwyler*, 2 B. R. 549; s. c. 3 Ben. 200; *in re Currier*, 13 B. R. 68; s. c. 2 Lowell, 436; *Perry v. Langley*, 1 B. R. 559; s. c. 7 A. L. Reg. 429; *Everett v. Derby*, 5 Law. Rep. 225; *in re Romanow* [D. C.], 92 Fed. Rep. 510; *Simonson v. Sinsheimer* [C. C. A.], 95 Fed. Rep. 948; *in re Williams*, 14 B. R. 132. As opposed to these cases, see *Sinsheimer v. Simonson* [D. C.], 96 Fed. Rep. 579; *Simonson v. Sinsheimer et al.* [C. C. A.], 100 Fed. Rep. 426). If the assignment were void because of the bankruptcy law, he is not affected thereby, and may file an involuntary petition (*In re Curtis* [D. C.], 1 N. B. News, 163; s. c. 91 Fed. Rep. 737). The same is true where a creditor participates in the benefits of an assignment before the passage of the bankruptcy act, that being too remote to be in contemplation of bankruptcy (*In re Folb* [D. C.], 1 N. B. News, 134; s. c. 91 Fed. Rep. 107). So a creditor who accepts a preferential transfer without fraud, it was held under the old law, was not estopped from filing an involuntary petition (*In re Hunt & Hornell*, 5 B. R. 433; *in re Rado*, 6 Ben. 230), nor one who acquires a lien through legal proceedings (*In re Sheehan*, 8 B. R. 345; *Cox v. Hale*, 10 Blatch. 56; s. c. 8 B. R. 562), the filing of the petition in such cases being deemed a waiver or surrender of the preference or lien (*In re Sheehan*, 8 B. R. 345; *in re Broich*, 15 B. R. 11; *in re Bloss*, 4 B. R. 147; *in re Stansell*, 6 B. R. 183. See *in re Israel*, 12 B. R. 204; s. c. 3 Dill. 511; *in re Currier*, 13 B. R. 68; *Clinton v. Mayo*, 12 B. R. 39; and also *in re Frost*, 11 B. R. 69; s. c. 6 Biss. 213, which is distinguished in the Broich case), though under the present law it has been held that he would be estopped until he surrendered the preference (*In re Rogers' Milling Co.* [D. C.], 102 Fed. Rep. 687), which he may do in the petition praying for the adjudication in bankruptcy, or in an amendment thereto made for that purpose (*In re Rado*, Fed. Cas. No. 11,522; s. c. 6 Ben. 230; *in re Hunt*, Fed. Cas. No. 6,882; *in re Marcer*, Fed. Cas. No. 9,060; *in re Rogers' Milling Co.*, *supra*), a claim may be a provable one under §63 without being allowable under §57g. It is the *provable*—not the *allowable*—claims which are to be considered in determining the question as to whether a creditor holding a preference is entitled to file an involuntary petition. This seems to be settled by the cases above cited which hold that the filing of an involuntary petition by a preferred creditor is a waiver of his preference. The statute nowhere provides the time when or manner how the preference shall be surrendered in order to make the provable claim an allowable one. It therefore may be surrendered at any time to enable the creditor to receive the benefit of the act. It is true, until the trustee is appointed, no one is in a position to formally receive the surrender (*In re Currier*, 13 B. R. 68), but it may be informally surrendered by the act of filing the petition, and especially so if in that the creditor expressly surrenders it, making such surrender a part of his petition. The fact that a creditor attacks an alleged preference as fraudulent in a State court will not estop him from again questioning the validity thereof by proceedings in bankruptcy (*Leidigh Carriage Co. v. Stengel* [C. C. A.], 1 N. B. News, 387; s. c. 95 Fed. Rep. 637).

Creditors who join in an involuntary petition and afterwards obtain a settlement of their claims cannot withdraw if such act will jeopardize the proceedings (*In re Beddingfield* [D. C.], 1 N. B. News, 385; s. c. 96 Fed. Rep. 190).

¹The duplicates really constitute the petition, and both should be filed at the same time. If one is filed within the four months specified in §36, and the other is not filed until after the four months, the failure will be fatal (*In re Stevenson*

three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors,¹ with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

e In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law,² and have not joined in the petition, shall not be counted.

f Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.³

[D. C.], 1 N. B. News, 313; s. c. 94 Fed. Rep. 110). While the petition, under this section, is required to be in duplicate, the schedules must be in triplicate, for the use of the clerk, referee and trustee (§7[8]).

¹The petitioning creditors have a right to examine the debtor fully as to the persons listed by him as creditors (*In re Hymes*, 10 B. R. 433; s. c. 7 Ben. 427). An issue of fact may be raised in regard to the number of creditors and amount of claims upon which the court must pass, and its finding is conclusive and final, not subject to collateral attack, even though erroneous (*In re Duncan*, 8 Ben. 365; s. c. 14 B. R. 18; *in re Scammon*, 6 Biss. 130; s. c. 10 B. R. 66; *in re Funkenstein*, 3 Saw. 605; s. c. 3 Cent. L. J. 448; s. c. 14 B. R. 213; *in re Burch*, 10 B. R. 150; *in re Rosenfelds*, 11 B. R. 88). The burden of proof on such an issue is upon the petitioners (*In re Hymes*, 10 B. R. 433; s. c. 7 Ben. 427; *in re Frost*, 11 B. R. 69; s. c. 6 Biss. 213).

²As to the manner of determining the degree of relationship, see note 5, p. 74.

³This paragraph has reference to proceedings before adjudication in bankruptcy, all creditors, in effect, being parties after adjudication and entitled to be heard without any special order permitting them to intervene (*In re Schwartz* [D. C.], 1 N. B. News, 266). If a petition filed under paragraph *b* of this section,

g A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.¹

SEC. 60. Preferred Creditors.²—*a* A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any

sufficient upon its face as to the number of creditors and amount of claims, should prove defective in such respects for some good reason, such as the debts of one or more of the petitioning creditors not being provable, creditors otherwise competent may appear before adjudication, join in the petition and be reckoned in making up the number of creditors and amount of claims required to support the petition (*In re Romanow* [D. C.], 92 Fed. Rep. 510; *in re Beddingfield* [D. C.], 1 N. B. News, 385; s. c. 96 Fed. Rep. 190). If the petition is not regular upon its face, however, it should be dismissed at once as the court has no authority to hold the case open in order that other creditors may intervene (*In re Burch*, 10 B. R. 150). The dismissal of the petition may be moved by the debtor or any creditor (*In re Williams*, 14 B. R. 132; *in re Scrafford*, 15 B. R. 104; s. c. 14 B. R. 184; *in re Hatje*, 6 Biss. 436; s. c. 12 B. R. 548).

¹See §58 and notes regarding notice to creditors.

²For analogous provisions, see R. S. §§5128, 5129, 5130; Act of 1800, §28; Act of 1841, §2; Act of 1867, §35.

See §1(15) for definition of insolvency; §3 as to acts of bankruptcy; §64 as to priority debts; and §67 as to liens. The language of §3 should be construed in connection with that of this section so far as possible, both sections being parts of the same general subject (*In re Tonkin*, 4 B. R. 52). If the language of both sections will not admit of the same interpretation, then each section should be construed independently (*In re Nickodemus*, 3 B. R. 230).

The word "suffered" as here used does not embody the idea of procured. It is not necessary that the debtor should be fraudulently or in any way actively concerned in causing the judgment to be entered. The mere fact that the debtor is insolvent and an action shall be prosecuted to judgment against him is sufficient to constitute a preference without reference to the intent, if it has the effect of giving other creditors of the same class a greater percentage of their debts (*In re Whalen* [D. C.], 1 N. B. News, 228; *in re Moyer* [D. C.], 1 N. B. News, 260; s. c. 93 Fed. Rep. 188; *in re Arnold* [D. C.], 1 N. B. News, 334; s. c. 94 Fed. Rep. 1001).

Whether a transfer, lien or judgment amounts to a preference must be determined solely by the effect it has upon the rights of other creditors, the question of an intent to give a preference, or the character or manner of the transaction leading to it being immaterial (*Goldman, Beckman & Co. v. Smith* [D. C.], 1 N. B. News, 160; s. c. 93 Fed. Rep. 183; *in re Whalen* [D. C.], 1 N. B. News, 228; *in re Moyer* [D. C.], 1 N. B. News, 260; s. c. 93 Fed. Rep. 188; *in re Dwiggin Bros.* [D. C.], 1 N. B. News, 292; *in re Little River Lumber Co.* [D. C.], 1 N. B. News, 306; s. c. 92 Fed. Rep. 585; *Johnson v. Wald* [C. C. A.], 1 N. B. News, 325; s. c. 93 Fed. Rep. 640; *in re Arnold* [D. C.], 1 N. B. News, 334; s. c. 94 Fed. Rep. 100; *in re Christensen* [D. C.], 101 Fed. Rep. 802; *in re Sloan* [D. C.], 102 Fed. Rep. 116; *in re Fixen et al.* [C. C. A.], 102 Fed. Rep. 295). Under the former Acts, the intent to prefer was material. It was one of the essential ingredients of an act of bankruptcy and had to be proved (*Morgan & Co. v. Mastick*, 2 B.

of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

R. 521; *Miller v. Keys*, 3 B. R. 224; *Doon v. Compton*, 2 B. R. 607; *Perry v. Langley*, 2 B. R. 596; s. c. 8 A. L. Reg. 427).

It should be noticed that the language of the statute contemplates that the preference shall be created only when the transfer is made to a creditor. If firm property be transferred by one partner to another, though injurious to the general creditors, the same cannot be impeached as a preference (*In re Rudnick* [D. C.], 102 Fed. Rep. 750). In this case, the partner who purchased the firm property transferred it to a bona fide purchaser for value, and the decision is based on the fact that all creditors suffered the same. And this is so even though the transfer be made under coercion (*Clarion Bank v. Jones*, 21 Wall. 325; *Giddings v. Dodd*, 1 Dill. 115; s. c. 4 B. R. 657; *in re Blatcheider*, 1 Low. 373). The intent is presumed when the transaction works the injury specified in the statute (*Johnson v. Wald*, *supra*), and the bankruptcy court may enjoin the disposal of property preferentially conveyed (*In re Kimball* [D. C.], 97 Fed. Rep. 29). An insolvent may in good faith borrow money to use in his business, give the loaner security therefor at the time the debt is incurred, and that security will not be voidable as a preference (§67[d] and notes thereto; *Tiffany v. Boatman's Saving Inst.*, 18 Wall. 376; s. c. 9 B. R. 245; *Brusteston v. Cook*, 6 E. & B. 296; *Harris v. Rickett*, 4 Hurl & N. 1; *Lee v. Hart*, 34 Eng. Law & Eq. 569; *Hutten v. Crutwell*, 1 El. & Bl. 15; *Hunt v. Mortimer*, 10 B. & C. 44; *Belle v. Simpson*, 2 H. & N. 410; *Wadsworth v. Tyler*, 2 B. R. 101; *ex p. Shouse*, Crabbe R. 482; *Bentley v. Wells*, 61 Ill. 59; *in re McKay & Aldus*, 1 Low. 561; s. c. 7 B. R. 230; *Galtman v. Hoena*, 12 B. R. 493), security being distinguished from a preferential transfer in that it is given at the time the indebtedness is incurred while the preferential transfer is made for an antecedent debt. Yet all transfers or payments made by an insolvent in consideration of such debts are not preferences. The effect must be to give one creditor a greater percentage of his claim than other creditors of the same class would receive. The real test seems to rest in the query as to whether the transfer on the whole diminishes the insolvent's distributable assets. If the transaction leaves him with as much assets which may be distributed among his creditors as he had before giving the security, then the security is not a preference and voidable, and if he has not as much, it is (*Darby v. Boatman's Saving Inst.*, 1 Dill. 141; s. c. 4 B. R. 601). The same principle is true when property is traded, or one form of security is exchanged for another (*Chattanooga Nat. Bank v. Rome Iron Co.* [C. C.], 102 Fed. Rep. 755; *Clark v. Iselin*, 21 Wall. 360; s. c. 9 B. R. 19; s. c. 10 Blatch. 204; s. c. 11 B. R. 337; *Livingston v. Bruce*, 1 Blatch. 318; *Sawyer v. Turpin*, 91 U. S. 114; s. c. 5 B. R. 339; s. c. 1 Holmes, 251; s. c. 2 Low. 29; s. c. 13 B. R. 271; *Burnhisel v. Firman*, 11 B. R. 505; s. c. 22 Wall. 170; *Cook v. Tullis*, 9 B. R. 433; s. c. 18 Wall. 332; *in re Hapgood*, 2 Low. 200). This is also true when property is transferred in extinguishment of a valid lien (*Catlin v. Hoffman*, 9 B. R. 342; s. c. 2 Saw. 486; *Hallack v. Tritch*, 17 B. R. 293; *in re Roseberry*, 16 B. R. 340; s. c. 8 Biss. 112), though the property relieved by the payment or transfer should become subject to the payment of the debts of the general creditors. If it does not, as where money is paid on a mortgage debt, it is a voidable preference if it enables one creditor to realize a greater percentage of his claim than other creditors of the same class (*Shutts v. F. N. Bank of Aurora* [D. C.], 98 Fed. Rep. 705). Again, when a mortgage is given by an insolvent in good faith to secure future purchases of goods, the mortgage is valid to the extent of the value of the goods actually advanced in reliance upon such mortgage (*Marvin v. Chambers*, 12

b If a bankrupt shall have given a preference within

Blatch. 495; *Schulze v. Bolting*, 17 B. R. 167; s. c. 8 Biss. 174). It has also been held, under the old law, that an insolvent debtor in good faith may balance accounts or settle with a creditor in so far as that transaction does not result in any actual transfer of property to the prejudice of creditors (*In re Comstock*, 12 B. R. 110; s. c. 3 Saw. 517). The reason at the bottom of such a doctrine would suggest that the same might be done without regard to the motives of the parties, it being nothing more or less than the striking of a balance. But under each of the former Acts it was provided that transfers made with the intent to defeat the bankruptcy Act would be voidable as preferences. The good faith referred to in the case last cited undoubtedly has reference to such provisions and simply meant that such settlement should be made without an intent to defeat the bankruptcy Act. That reason cannot apply to the present Act since it does not contain such a provision. That it was the clear intention of Congress that such transfers should not be construed as voidable because of being preferential is evidenced by the fact that such a clause was embodied in the bill which became the present law, when it reached the conference committee, and was by that committee struck out. It may be said, therefore, that under the present Act, an insolvent may balance accounts with a creditor in so far as he does not transfer to him any actual property—property as distinguished from the debit account. It has, in fact, already been held under the present Act that he may settle his account in the usual course of business and transfer property in consummation thereof. The transfer of the property might constitute an act of bankruptcy, but the property so transferred would not constitute a voidable preference unless the creditor receiving it knew that a preference was intended (*In re Eggert* [D. C.], 98 Fed. Rep. 843), or had such knowledge of his debtor's financial condition as would put a prudent man upon inquiry, in which case he will be charged with a knowledge of the facts which such inquiry should reasonably be expected to disclose (*In re Eggert* [C. C. A.], 102 Fed. Rep. 735; *in re Blair et al.* [D. C.], 102 Fed. Rep. 987). This conclusion, though, will not reach beyond the accounts between the parties so as to cover transactions out of the ordinary course of their business, as where one liable with the insolvent pays the obligation after the insolvent has filed his petition in bankruptcy, he cannot deduct the amount so paid from an account, or balance of an account, which he owes the insolvent; he must pay that account to the insolvent's trustee, prove his claim for the payment he made in behalf of the insolvent and receive his dividend as other creditors (*In re Bingham* [D. C.], 1 N. B. News, 351; s. c. 94 Fed. Rep. 796; *contra, in re Dillon* [D. C.], 100 Fed. Rep. 627). An insolvent may assent to a creditor stopping goods *in transitu* before they have come into his possession: that will not amount to a preference, for the debtor is only assenting to a right which the creditor could otherwise lawfully exercise (*In re Foot*, 11 Blatch. 530; s. c. 11 B. R. 153). Where there is no mutual account, money paid in satisfaction of a debt is a preference within the meaning of this section if the bankrupt was insolvent at the time of such payment, "money" being "property" (*In re Lange* [D. C.], 97 Fed. Rep. 197; *in re Conhaim* [D. C.], 97 Fed. Rep. 923; *in re Ft. Wayne Electric Corp.* [C. C. A.], 99 Fed. Rep. 400; *Strobel & Wilken Co. et al. v. Knost et al.* [D. C.], 99 Fed. Rep. 409).

An agreement to pledge personal property as security for a debt is not executed until the goods are delivered to the creditor or set apart and treated as his. Under such agreement the creditor acquires no lien on the property, and if he takes it into his possession a few days before the filing of the petition in bankruptcy, the transaction will be a voidable preference, though the original agreement was made more than four months before that time (*In re Sheridan et al.* [D. C.], 98 Fed. Rep. 406). Such an agreement would be otherwise, however, did it

four months' before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference,¹

originate by the creditor, at the time of the agreement, advancing the money by which the property was purchased (*Sabin v. Camp* [C. C.], 98 Fed. Rep. 974).

¹The general rule of law is that when a statute fixes a period within which a thing may or may not be done, if the last day of that period fall on a Sunday or a legal holiday, the period will be considered as ending the day before rather than the day after such Sunday or holiday (Am. & Eng. Ency. Law, *infra* Time). This rule, in construing the former Act which was similar to the present on this subject (Act of 1867, §48), was ignored by the bankruptcy courts. They also differed when the last day did not fall on a Sunday or holiday as to the exact day on which the period expired, some of the courts holding that the first day of the period should be included and the last day of the period excluded from the computation. Others held exactly to the contrary, while many courts were of the opinion that portions of both the first and last days should be included and excluded, counting the hours and minutes from the beginning to the ending of the period, in that respect disregarding the common law rule that portions of a day were not to be counted. On the whole, the cases were so confusing that the court, in *Dutcher v. Wright*, 94 U. S. 553; s. c. 16 Albany Law. J. 100, concluded that it was impossible to deduce from them any general rule that would apply in all cases. As to the various holdings mentioned, see *in re Lang*, 2 B. R. 480; *Cooley v. Cook*, 125 Mass. 406; *ex p. Farquhar*, 1 Mont. & McA. 7; *Westbrook Mfg. Co. v. Grant*, 60 Me. 88; *York v. Hoover*, 4 B. R. 479; *Cowie v. Harris*, 1 Moody & N. 141; *in re Richardson*, 2 Story, 571; *Sadler v. Leigh*, 4 Camp. 197; *ex p. D'Obree*, 8 Ves. 82; *in re Wydown*, 14 Ves. 87; *Thomas v. Desanges*, 2 B. & Ald. 586; *in re Howes*, 6 Law Rep. 297; *in re Wellman*, 7 Law Rep. 25. The present Act fixes the manner of computing a period of time, when enumerated by days, as excluding the first and including the last, unless the last fall on a Sunday or a holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday (§31). It is fair to presume that Congress intended that this rule should also be followed in computing time, when enumerated by months and years, the courts thus far having put that construction upon it (*In re Stevenson* [D. C.], 1 N. B. News, 313; s. c. 94 Fed. Rep. 110; *Leidigh Carriage Co. v. Stengel* [C. C. A.], 1 N. B. News, 387; s. c. 95 Fed. Rep. 637). A petition insufficient to give the court jurisdiction to make an adjudication cannot be filed within the four months so as to render the preference voidable and a sufficient one filed after four months, for that petition which marks the end of the period is the one on which the court can make the adjudication (*In re Rogers*, 10 B. R. 444).

²"Reasonable cause to believe" that the debtor intended to give a preference must have existed at the time the preference was created (*Dow v. Sargent*, 15 N. H. 115; *Toof v. Martin*, 13 Wall. 40; s. c. 6 B. R. 49; *Clark v. Iselin*, 21 Wall. 360; s. c. 11 B. R. 337; s. c. 10 Blatch. 204; s. c. 9 B. R. 19; *Haughey v. Albin*, 2 Bond, 244; *in re Onimette*, 3 B. R. 566; s. c. 1 Saw. 47), and its existence at that time must be alleged in the trustee's complaint or declaration (*In re Hunt*, 2 B. R. 539; *Cramp v. Chapman*, 15 B. R. 571. See also *Forbes v. Howe*, 102 Mass. 427). It is a question of fact to be determined by a jury from all the facts and circumstances of the case, though those facts and circumstances must be such as will lead the jury to a well grounded conclusion that the creditor believed rather than suspected that the debtor intended to give a preference (*Forbes v. Howe*, 102 Mass.

427). The fact that the debtor frequently borrowed money from the creditor, that he was obliged to renew his notes, that he was in the habit of over-drawing his account, that he was addicted to incorrect habits, that he was reckless in his business methods, and that he seemed to be pressed for money are not sufficient to warrant a jury in finding that the creditor had reasonable cause to believe that the debtor intended to give a preference. Such facts would be grounds for suspicion that the debtor was in failing circumstances, but no cause for a well-grounded belief that he was insolvent (*Grant v. Nat. Bank*, 97 U. S. 80; *Stucky v. Masonic Savings Bank*, 108 U. S. 74). "To make mere suspicion a ground for nullity would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the law to establish any such rule." (*Grant v. Nat. Bank*, *supra*) Both of the cases last cited were by the U. S. Supreme court, and in view of another case decided by that court and next cited, it should be stated that the facts showed that most of the debtor's indebtedness was due to persons living in counties other than that in which the preferred creditor resided, and did not show that such creditor had any knowledge of the debtor's insolvency. Had the other creditors, or a number of them, resided in the county where the preferred creditor lived, the decision might have been different as the court draws a fine distinction between "reasonable cause to believe" and "reasonable cause to suspect," as will appear from the following language used by that court in *Buchanan v. Smith*, 7 B. R. 513; s. c. 16 Wall. 277; 8 Blatch. 153: "A creditor securing a preference from his debtor over other creditors of the debtor cannot be said to have had reasonable cause to believe that his debtor was insolvent at the time unless such was the fact; but if it appears that the debtor giving the preference was actually insolvent, and that the means of knowledge on the subject were at hand, and that facts and circumstances were known to the creditor securing the preference which clearly ought to have put him as a prudent man upon inquiry, it would seem to be a just rule of law to hold that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have ascertained the fact by reasonable inquiry. Ordinary prudence is required of a creditor under such circumstances, and if he fails to investigate when put upon inquiry, he is chargeable with all knowledge it is reasonable to suppose he would have acquired if he had performed his duty." If, in the light of this language, the facts show that the creditor had reasonable cause to believe that the debtor was insolvent and that it was intended by the transfer to give a preference, the same will be voidable by the trustee (*Toof v. Martin*, 13 Wall. 40; s. c. 1 Dill. 203; *Rice v. Melendy*, 41 Iowa, 399; *Scammon v. Cole*, 3 Cliff. 472; s. c. 5 B. R. 257; *Graham v. Stark*, 3 Ben 250; s. c. 3 B. R. 357; *Wager v. Hall*, 16 Wall. 584; s. c. 3 Biss. 28; *Otis v. Hadley*, 112 Mass. 100; *ex p. Mendell*, 1 Low. 506; *Alderdice v. Bank*, 1 Hughes, 47; s. c. 11 B. R. 398; *Peckham v. Burrows*, 3 Story, 544; *in re Wright*, 2 B. R. 490; *Sedgwick v. Sheffield*, 6 Ben 21; *Hill v. Simpson*, 7 Ves. 170). Ordinarily, a transfer will be considered fraudulent when made in other than the usual course of trade, or the accustomed dealings between the parties (*Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dill. 186). This presumption can only be overcome by proof on the part of the creditor that he took the proper steps to learn the pecuniary condition of the debtor, and all reasonable means pursued in good faith must be used for this purpose (*Walbrun v. Babbitt*, [U. S. Supreme Ct.], 16 Wall. 577; s. c. 9 B. R. 1), the more unusual or suspicious the transaction, the greater being the diligence required (*Schulenberg v. Kabureck*, 2 Dill. 132).

The statute makes the principal expressly liable for the knowledge which "his agent acting therein" has. "Acting therein" undoubtedly has reference to the particular agent who acts in connection with the preference. Does this mean that he shall not be liable for the knowledge which any other agent than the one so acting may possess? That would seem to be the intention, otherwise there was no occasion to refer to the agent's knowledge at all since it is a settled rule of law that the principal is chargeable with the knowledge of his agents (*Rogers v. Palmer*,

it shall be voidable by the trustee,¹ and he may recover

102 U. S. 263; *Sage v. Wynkoop*, 16 B. R. 363; s. c. 104 U. S. 319; *Markson v. Hobson*, 2 Dill. 327; *Mayer v. Hermann*, 10 Blatch. 256; *Bank of U. S. v. Davis*, 2 Hill [N. Y.], 451; *Ingalls v. Morgan*, 10 N. Y. 178; *Fullton Bank v. N. Y. & S. C. Co.*, 4 Paige, 127; *Ungeuitter v. Sachs*, 3 B. R. 723; s. c. 4 Ben. 167; *Grismold v. Haven*, 25 N. Y. 595; *North River Bank v. Aymar*, 3 Hill, 262; *David v. Bemis*, 4 N. Y. 453; *Vogle v. Lathrop*, 4 B. R. 439; *in re Meyer*, 2 B. R. 422; *Atty. Gen. v. Siddons*, 1 Crompt. & Jer. 220. This is also true of sub-agents whom the principal's agent may rightfully employ (*Story on Agency*, §§452, 454; *Storrs v. City of Utica*, 17 N. Y. 104; *Boyd v. Vanderkamp*, 1 Barb. Ch. 273; *Rourke v. Story*, 4 E. D. Smith, 54; *Lincoln v. Batelle*, 6 Wend. 475). This rule is founded on the contract relations that exist between master and servant whereby it is the servant's duty to communicate such information as he may have on the subject to his master. Such relations do not exist between the principal and attorneys engaged by a collecting agency with which the principal left his claim, even though such attorneys acted in the name and took preferences in behalf of the principal, the principal not receiving the proceeds of the preferential transfer. Such attorneys are servants of the collecting agency, and that agency is regarded as an independent contractor and debtor to, rather than the agent of, the original principal (*Hoover v. Wise* [U. S. Supreme Ct.], 91 U. S. 308; s. c. 14 B. R. 264, citing *Reeves v. St. Bank of Ohio*, 80 Ohio St. 465; *MacKersy v. Ramsay*, 9 Clark & Fin. 818; *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Com. Bank of Penn. v. Union Bank*, 11 N. Y. 203; *Allen v. Merchants' Bank*, 22 Wend. 215; *Bradstreet v. Everson*, 72 Penn. 124; *Lewis v. Peck*, 10 Ala. 142; *Cobb v. Becke*, 6 Ad. & Ellis, N. S., 930; s. c. *sub nom.*, *Hoover v. Greenbaum*, 61 N. Y. 305). Nor is the principal bound by the knowledge of an attorney whom he directly engages if that knowledge was acquired by the attorney while in the employ of some prior client, especially if its disclosure would amount to a betrayal of professional confidence (*The Distilled Spirits*, 11 Wall. 356, citing *Dresser v. Norwood*, 17 Common Bench, N. S., 466; *Warrick v. Warrick*, 3 Atkyns, 291; *Mountford v. Scott*, Turner & Russell, 274; *Hart v. Farmers' Bank*, 33 Vermont, 252; *N. Y. C. Ins. Co. v. Nat. Prot. Co.*, 20 Barb. 468). But "where the attorney of a creditor is prosecuting a debtor to enforce payment of a debt, and by reason thereof the debtor discloses to him that he is insolvent and asks his advice, although the attorney may possibly find himself involved in some conflict of duty, for he certainly has no right to accept in confidence from the adverse party information which his client ought to know, yet he cannot by accepting such retainer evade the operation of the rule. In every step of the prosecution of the claim to collection he is the agent of the creditor; the performance of his duty to that creditor involves the gaining of knowledge of the debtor's insolvency, and no proffered confidence put in him by the adverse party can make that information less his client's property or less information acquired in his agency and imputable to such client" (*Mayer v. Herman*, 10 Blatch. 256).

¹The preference here made voidable by the trustee is valid as to all other persons, and the property transferred is neither subject to re-sale by the debtor nor attachment, judgment or execution liens of his creditors thereafter created (*Cook v. Rogers*, 13 B. R. 97; s. c. 31 Mich. 391 [citing *James v. Whitbread*, 11 C. B. 406; *Coale v. Williams*, 7 Exch. 205, and distinguishing *Buchanan v. Smith*, 7 B. R. 513; s. c. 16 Wall. 277, and *McLean v. Meline*, 3 McLean, 199]; *Dodge v. Sheldon*, 6 Hill, 8; *in re Biesenthal*, 15 B. R. 228; *Hathaway v. Brown*, 18 Minn. 414; *Seaman v. Stoughton*, 3 Barb. Ch. 344; *in re Klancke*, 4 B. R. 648; s. c. 4 Ben. 326; *in re Badenheim*, 15 B. R. 370; *Everett v. Stone*, 3 Story, 454). There are some cases opposed to this, however, in holding that if the preference is set aside, the property would be subject to liens, in the order of their priorities attaching after the

the property¹ or its value² from such person.

c If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

preference was created the same as though the transfer had been absolutely void (*McLean v. Meline, supra*; *MacDonald v. Moore*, 15 B. R. 26; *Haughey v. Albin* 2, B. R. 399; s. c. 2 Bond, 244). If the transfer whereby the preference is created is fraudulent as to creditors, it is void and the property subject to subsequent liens, except where such liens are voidable under this act (*Johnson v. Rogers*, 15 B. R. 1). When a preferential transfer is annulled, all valid liens on the property which merged or became extinguished by the transfer are revived (*Avery v. Hackley*, 20 Wall. 407; *in re Kahley*, 4 B. R. 378; s. c. 2 Biss. 383). So with old securities given in exchange for new ones; when the latter are invalidated, the former are restored (*Crippen v. Heermance*, 9 Paige, 211; *Burnhisel v. Firman*, 22 Wall. 170; s. c. 11 B. R. 505, citing *Parker v. Cousins*, 2 Grattan, 389; *F. & M. Bank v. Joslyn*, 37 N. Y. 353; *Cook v. Barnes*, 36 N. Y. 521; *Rice v. Welling & Fike*, 5 Wendell, 595).

¹A creditor receiving property under a preferential transfer which is only voidable can convey such property to one who buys for valuable consideration and in good faith, if such purchaser has no notice of its voidable character, and such purchaser will acquire a valid and non-voidable title thereto (*Reson v. Knapp*, 4 B. R. 349; s. c. 1 Dill. 186; *Butler v. Haughwout*, 42 Ill. 9; *Morse v. Godfrey*, 3 Story, 389; *Willard's Eq. Jur.* 256). The preferred creditor does not hold the property so acquired tortiously, and before the trustee can recover it, unless there has been an actual conversion, he must demand its possession. No one but the trustee can bring an action for it (*Glenny v. Langdon* [U. S. Supreme Ct.], 98 U. S. 20 [Reviewing the English practice and over-ruling *Dewey v. Moyer*, 72 N. Y. 70 and cases there cited holding that where the trustee neglects to act, the creditors may do so]; *Trimble v. Woodhead*, 102 U. S. 647; *Moyer v. Dewey*, 103 U. S. 301; *McDonald v. Banendahl*, 4 Hun. 205; s. c. 64 N. Y. 638; s. c. 6 N. Y. Supreme Ct., 546). If the property has sustained any damage or injury while in the hands of the preferred creditor, the trustee may recover therefor if he is obliged to bring replevin (*Schuman v. Fleckenstein*, 15 B. R. 224; s. c. 4 Saw. 174, citing *Brook v. McCracken*, 10 B. R. 461; *Hyde v. Sime*, Chitty, 170; s. c. 2 Hen. Black, 135; *Trisomy v. Orr*, 49 Cal. 617).

²The value of the property is what it was actually worth, and the preferred creditor is chargeable therewith if the property actually or constructively passed into his possession, or was sold under legal process at his instance (*Clarion Bank v. Jones*, 21 Wall. 325, citing *Conrad v. Ins. Co.*, 6 Pet. 274; *Comly v. Fisher*, Taney's Decs. 121; *Marshall v. Knox*, 16 Wall. 559; *Eby v. Schumacher*, 29 Penn. St. 40; *Sedgw. on Damages* [6th Ed.], 634; *Mayne on Damages* [2d Ed.], 317). When the property is sold on legal process, as stated, the trustee may adopt the sale, in which case he is entitled to the full amount for which the goods were sold and interest from the time the preferred creditor received the proceeds of such sale (*Cookingham v. Morgan*, 7 Blatch. 480; *Traders' Nat. Bank v. Campbell*, 14 Wall. 87; s. c. 2 Biss. 423. See also *Schuman v. Fleckenstein*, 15 B. R. 224; s. c. 4 Saw. 174 and cases there cited). If a debtor, knowing that his creditor is insolvent, collusively

d If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

pays the amount due him to a third person on the creditor's order, thereby creating a preference, such debtor will be liable to the trustee of such creditor for the amount so paid (*Fox v. Gardner* [U. S. Supreme Ct.], 21 Wall. 475, citing *Bolander v. Gentry*, 36 Cal. 105; *Hanson v. Herrick*, 100 Mass. 323).

CHAPTER VII.

ESTATES.

SEC. 61. Depositories for Money.—*a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.¹

SEC. 62. Expenses of Administering Estates.—*a* The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved they shall be paid or allowed out of the estates in which they were incurred.²

¹No former act had analogous provisions. It is the duty of the trustee to deposit all estate money received in such depositories (§47[3]) and to disburse it only by check or draft (§47[4]; Rule XXIX).

²For analogous provisions, see Act of 1800, §29; Act of 1867, §28; R. S. §§5099, 5127A, 5127B. See §2(18) as to the taxation of costs; §5^c as to the payment of expenses from individual and firm estates; §64^b(3) as to the costs of administration being priority debts; Rule X as to indemnity for expenses; Rule XXVI as to traveling and incidental expenses of the referee; and Rule XXXV as to the compensation of clerks, referees and trustees. Aside from the actual and necessary expenses here provided for, the court may make reasonable allowance as compensation for the services of persons not expressly provided for elsewhere, where such services are necessary (*In re Scott et al.* [D. C.], 99 Fed. Rep. 404).

No definite rule has ever been laid down relative to just what expenses might be incurred in administering a bankrupt estate. Each case has been made to depend upon its own peculiar exigencies (*In re Noyes*, 6 B. R. 277). The law unquestionably presumes that one charged with the duties of administering an estate is qualified to do so without legal or clerical assistance. The trustees, if he should require assistance in the faithful discharge of his duties, should first obtain an order therefor. He "is not at liberty to charge the assets of the estate in his hands for professional or clerical services rendered him in the execution of his trust, until the same shall have been first allowed by the court", though where the exigencies of the case are such that an order could not be first obtained, he will be

SEC. 63. Debts which may be Proved.¹—a Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;² (2) due as costs taxable against an involuntary

allowed reasonable compensation for such expenses as he may have incurred (*In re Noyes, supra*). It has been held that a trustee may engage counsel to investigate the affairs of an estate, though no litigation followed (*In re Colwell*, 15 B. R. 92), and to prosecute and defend suits as well as obtain legal advice when necessary, but not for the compromise of an ordinary claim (*In re Davenport*, 3 B. R. 77). When the trustee is himself an attorney, and acts where, had he not been an attorney, one would have to be engaged, the court may undoubtedly allow him therefor (*In re Welge*, 1 McCrary, 46). It will not allow him for an auctioneer's services unless he first procures an order (*In re Peques*, 3 B. R. 80; *in re Sweet*, 9 B. R. 48). The trustee will undoubtedly be allowed necessary and reasonable expenses for preserving the property of the estate (*In re Gregg*, 3 B. R. 529). It had also been held under the old law that he might allow the assignee, when a general assignment for the benefit of creditors has been set aside by adjudication in bankruptcy, expenses for converting the property into money, and be reimbursed therefor on the theory that the action of the assignee saved the bankrupt's estate that expense (*McDonald v. Moore*, 15 B. R. 26; s. c. 1 Abb. N. C. 53; *Burkholder v. Stump*, 4 B. R. 597; *in re Cohn*, 6 B. R. 379), as well as money advanced by such assignee to discharge valid liens upon the property (*Livingston v. Bruce*, 1 Blatch. 318. See also *in re Gregg*, 3 B. R. 529), as well as money paid to creditors by such assignee in carrying out his trust (*Cragin v. Thompson*, 2 Dill. 513; s. c. 12 B. R. 81; *Jones v. Kinney*, 5 Ben. 259; s. c. 4 B. R. 649). The amounts so paid, under the former act could be reasonably construed as expenses of administration, but under the provisions of the next section of this act, they would undoubtedly be provable debts with regard to which the trustee would have nothing to do.

¹For analogous provisions, see R. S. §§5067, 5068, 5069, 5070; Act of 1800, §39; of 1841, §5; of 1867, §19. See also §55 as to proof of partnership claims against individual estates and *vice versa*, §14 relative to discharges, §17 as to debts not affected by a discharge, §57 as to proof and allowance of claims, §65 as to declaration and payment of dividends, §68 as to set-offs and counter claims, and Rule XXI relative to proof of debts, as well as the notes to such cross-references. Debts which are not provable do not come in for a dividend, and are not affected by a discharge (*In re May & Merwin*, 9 B. R. 419; s. c. 47 How. Pr. 37; s. c. 7 Ben. 238).

²Under former acts a distinction was made by the courts between judgments obtained in the ordinary course of litigation upon a right of action and those resulting from penal steps or proceedings. Thus, a judgment imposed as a fine by way of a penalty was not considered a debt, and was not provable (*In re Sutherland*, 3 B. R. 314; s. c. Deady, 416), nor was one growing out of contempt proceedings for disobeying an injunction, where the same was payable to the party in whose favor the injunction was issued and who suffered by its violation (*People v. Spalding*, 10 Paige, 284; s. c. 7 Hill, 301; s. c. [U. S. Supreme Ct., affirming], 4 How. 21). In construing the present act, the first proposition

bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice;¹ (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt;² (4) founded upon an open account, or upon a contract express or implied;³ and (5) founded upon provable debts reduced to

has been overruled in a holding that a judgment for a fine is provable (*In re Alderson* [D. C.], 98 Fed. Rep. 588). Where a judgment of a State court requires the payment of a weekly sum for the care of one's offspring, the amounts falling due after the filing of the petition are not provable (*In re Hubbard* [D. C.], 98 Fed. Rep. 710). This is also true as to alimony (*In re Nowell* [D. C.], 99 Fed. Rep. 931), though a judgment for alimony already accrued or to accrue has been held to be a provable debt (*In re Challoner* [D. C.], 98 Fed. Rep. 82), yet even this has opposition in a case holding that the overdue is not provable (*In re Anderson* [D. C.], 97 Fed. Rep. 321). Judgments for breach of promise to marry, though in the nature of penalties, are provable (*In re Sidle*, 2 B. R. 220; *in re Sheehan*, 8 B. R. 345; *in re McCauley* [D. C.], 101 Fed. Rep. 223). Costs are invariably included as part of a judgment, and will be so considered without regard to whether the debt sued upon was provable in bankruptcy (*Graham v. Pierson*, 6 Hill, 247; *in re O'Neil*, 1 Lowell, 162). Any creditor or party in interest may impeach judgments sought to be proved on the ground of fraud, preference or irregularity (*In re Fowler, ex p. O'Neil*, 1 B. R. 677; s. c. 1 Low. 163; *Partridge v. Dearborn*, 9 B. R. 474; s. c. 2 Low. 286), or have them allowed, expunged or re-examined (*In re Ankeny* [D. C.], 100 Fed. Rep. 614), the party urging such to have the burden of proof as to the facts alleged in the petition therefor (*In re Howard* [D. C.], 100 Fed. Rep. 630).

¹See § 11 relative to suits by and against bankrupts.

²This provision does not exclude from priority such claims as referred to (*In re Lewis* [D. C.], 99 Fed. Rep. 934).

³Debts founded upon an open account or upon an express or implied contract must be in existence when the petition in bankruptcy is filed, even though not then payable (*In re Orne*, 1 B. R. 57; s. c. 1 Ben. 361; *May v. Merwin*, 7 Ben. 238; *in re Roche* [C. C. A.], 101 Fed. Rep. 956). If the debt is barred by the statute of limitation of the State where the parties resided when the debt was contracted, it is not provable in bankruptcy, and if proven, the proof will be expunged on motion of any creditor (*In re Lipman* [D. C.], 1 N. B. News, 310; s. c. 94 Fed. Rep. 353; s. c. 2 A. B. R. 46; *in re Resler* [D. C.], 1 N. B. News, 280; s. c. 95 Fed. Rep. 804; *in re Kingsley*, 1 B. R. 329; s. c. 1 Low. 216; *in re Hardin*, 1 B. R. 395; *in re Cornwall*, 6 B. R. 305; s. c. 9 Blatch. 114; *in re Reed*, 11 B. R. 94; s. c. 6 Biss. 250; *in re Noeson*, 12 B. R. 422; s. c. 6 Biss. 443). This rule follows the English practice (*Ex p. Dewney*, 15 Vesey, 479; *in re Clendening*, 9 Irish Eq. R. N. S. 287), and is but an application of the statutes and rules of practice governing Federal courts whereby they must recognize the statute of limitation of each State within their jurisdiction (8 Peters, 372). While recognizing this rule, the bankruptcy courts of New York held, what seems to be in opposition, that such debts were provable when the statute affected the remedy and not the contract—that is when it barred the action in one jurisdiction but not in others, the statute under consideration providing that the action should only be barred when the defendant appeared

judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge,

and so plead it, the bar being otherwise considered waived (*In re Ray*, 1 B. R. 203; s. c. 2 Ben. 53). If a debt is not affected by the statute of limitation when the petition is filed, it cannot thereafter be so affected for the statute ceases to run on the filing of the petition (*In re Eldridge*, 12 B. R. 540; *in re Wright*, 6 Biss. 317; *Contra, Nicholas v. Murray*, 5 Saw. 320; s. c. 18 B. R. 469). A debt founded on a contract made between citizens of different States, valid in one State but invalid in the other because of prohibitory liquor laws, is provable in bankruptcy (*In re Murray*, 3 B. R. 765).

As a general rule, all claims existing at the time the petition is filed, and enforceable at law or in equity, are provable in bankruptcy.

There are certain classes of claims relative to which the rule is unsettled. It has been held that claims for alimony are provable and will be discharged (*In re Challoner* [D. C.], 98 Fed. Rep. 82), though another case holds the very opposite (*In re Anderson* [D. C.], 97 Fed. Rep. 321). Claims arising out of speculative contracts will be governed by the general rules of law, and if under these the validity of the contract can be affirmed, the claim is provable (*Hill et al. v. Levy* [D. C.], 98 Fed. Rep. 94). Whenever a debt has been fraudulently contracted, the same may be proved without the creditor thereby waiving the right to cause the bankrupt's arrest under a State law (*In re Lewensohn* [D. C.], 99 Fed. Rep. 73).

Any creditor or party in interest may oppose the allowance upon any ground that might be urged as a defense by the bankrupt in an action thereon (*In re Prescott*, 5 Biss. 523; s. c. 9 B. R. 385; *ex p. Yonge*, 3 Vesey & Beames, 31; *Jeffo v. Wood*, 2 P. Wms. 128; *Murphy's case*, 1 Sch. & Le Froy 44; *in re Goodman*, 5 Biss. 401; s. c. 8 B. R. 380; *in re Jaycox & Greene*, 12 Blatch. 209; *ex p. Jones*, 17 Ves. 332; *Lowe v. Waller*, Doug. 736; *in re Chandler*, 6 Biss. 53; s. c. 9 B. R. 514; *in re Young*, 6 Biss. 53; *ex p. Mumford*, 15 Ves. 289; *Lehman v. Strassberg*, 2 Woods, 554; *in re Greene*, 15 B. R. 198; *ex p. Cottrell*, Cowp. 742; *ex p. Daniels*, 14 Ves. 191; *Capell v. Trinity Church*, 11 B. R. 536; *in re Blandin*, 5 B. R. 39; s. c. 1 Low. 543; *Sigsby v. Willis*, 3 B. R. 207; s. c. 3 Ben. 371; *in re Carmichael* [D. C.], 96 Fed. Rep. 594; *in re Allen* [D. C.], 96 Fed. Rep. 512), and if the claim be allowed, such creditor or party in interest may have the allowance vacated for fraud (*In re Headley* [D. C.], 97 Fed. Rep. 765), or because the claim is wanting in equity (*In re Knox* [D. C.], 98 Fed. Rep. 585). The proof of claim may be amended so as to save the benefit of a lien when a mistake has been made in inadvertently proving a claim as unsecured when the creditor held security (*In re Falls City Shirt Mfg. Co.* [D. C.], 98 Fed. Rep. 592), or for any reason on leave, when fraud is not present (*In re Meyers et al.* [D. C.], 99 Fed. Rep. 691; *in re Wilder* 101 Fed. Rep. 104). An assignee cannot prove a claim which the assignor could not have proved (*In re Wiener & Goodman Shoe Co.* [D. C.], 96 Fed. Rep. 949), especially when it has been assigned to him as collateral and is tainted with fraud (*Beers v. Hanlin* [D. C.], 99 Fed. Rep. 695). When one holds security covering both provable debts and others which are not provable, he is entitled to apply the security to the payment of the debts not provable [*Ex p. Kensington*, 2 M. & A. 362]. It would also seem that one holding security is entitled to full interest up to the time the debt is paid out of the proceeds of the property (*In re Newland*, 7 Ben. 63; *in re Haake*, 7 B. R. 61; s. c. 2 Saw. 231), though a bankrupt's estate is only liable therefor up to the time the petition was filed (*In re Orne*, 1 B. R. 57; s. c. 1 Ben. 361; *in re Haake, supra*). A debt actually existing is provable, though not yet due, and if it bears interest, that amount unearned will be rebated (*Sloan v. Lewis*, 22 Wall. 150); if the debt be over-due, interest will be allowed after maturity at the legal rate and not at that agreed upon if the latter be

less costs incurred and interests accrued after the filing of

the greater (*In re Bartenbach*, 11 B. R. 61). Debts of a joint or a joint and several nature may be proved against the estate of any one whom the creditor might have sued (*In re Bates* [D. C.], 100 Fed. Rep. 263; *Downing v. Trader's Bank*, 2 Dill. 136; s. c. 11 B. R. 371; *in re Troy Woolen Co.* 8 B. R. 412), and against one after another until the entire amount is paid (*In re Howard, Cole & Co.*, 4 B. R. 571; *Mead v. Bank*, 6 Blatch. 185; s. c. 2 B. R. 173; *Emery v. Bank*, 7 B. R. 217; s. c. 3 Cliff. 507). A similar rule obtains as to debts arising out of copartnership relations. Where the copartnership does not become bankrupt, it has been held that no provable claim arises between a partner not becoming bankrupt and one who does until the partnership debts have been paid and all the firm assets disposed of (*Hester v. Baldwin*, 2 Woods, 433), though it would seem that where partners pay firm debts, they may prove such amount as may be equitably due after settling the firm affairs or crediting the bankrupt partner with such interest as he may be entitled to in the assets (*Wilkins v. Davis*, 15 B. R. 61; *Wood v. Dodgson*, 2 Maule & S. 105; *Affalo v. Foundrinier*, 6 Bing. 306; *Butcher v. Forman*, 6 Hill. 583; *ex p. Watson*, 4 Maddock's Rep. 477; *Sigsby v. Willis*, 3 B. R. 207; s. c. 3 Ben. 371). But where a partner misappropriates assets the loss to the solvent partners may be treated as independent of and foreign to the copartnership relations and proved as though such assets belonged to the solvent partners personally (*Ex p. Yonge*, 3 Vesey & Beames, 31; *Sigsby v. Willis*, 3 B. R. 207; s. c. 3 Ben. 371).

If a debt is not in existence at the time the petition is filed—that is, if it is not a "fixed liability, absolutely owing"—it cannot be proved against a bankrupt's estate, for no claim is provable except such as are expressly provided for by statute (*May v. Merwin*, 7 Ben. 238; s. c. 9 B. R. 419; s. c. 47 How. Pr. 37; *in re Roche* [D. C.], 101 Fed. Rep. 956). One may be contingently liable for the bankrupt as a surety, but such liability is not a debt and does not become such until an obligation to pay actually arises. Until that time such liabilities do not amount to provable debts (*In re Loder*, 4 B. R. 190; s. c. 4 Ben. 305; *Dyer v. Cleveland*, 18 Vt. 241). It is not easy, however, to determine at the present time just what such a debt is so as to distinguish it from "a fixed liability, absolutely owing." The authorities do not clearly define such a debt. The Massachusetts courts hold that it is an existing demand but that the right to bring an action on it depended upon a contingency (*French v. Morse*, 68 Mass. 111). The New York courts hold that if there was a present claim, or when one was certain to arise, the liability was not contingent (*Jemison v. Blowers*, 5 Barb. 686). The United States Supreme court in passing on §5, of the Act of 1841, substantially confirms the last holding (*Riggin v. Maguire*, 15 Wall. 549. See also *Mills v. Auriel*, 1 Smith's Leading Cases; *Sheldon v. Pease*, 10 Mo. 475). In view of the provision in §57 authorizing a surety to prove the claim when the creditor fails to do so, the question of proving a contingent claim is only likely to arise when the surety is himself the bankrupt, or where the obligation rests upon continuing contracts. When it is remembered that no debt is discharged which is not provable, the question of what is "a fixed liability" becomes highly important since a discharge may leave the bankrupt in practically the same situation he occupied before becoming bankrupt by his contingent ones maturing into "fixed liabilities." Somewhat akin to the liability of a surety is that of a lessee upon a lease providing for rent to accrue from time to time in the future. It is well settled that such rent accruing in future installments is not provable except in so far as the installments have fallen due by an actual enjoyment of the lease-hold (*In re Ellis* [D. C.], 98 Fed. Rep. 967; *Bray v. Cobb*, 100 Fed. Rep. 270; *in re Arnstein et al.* [D. C.], 101 Fed. Rep. 706; *Savory v. Stocking*, 4 Cush. 607; *English v. Key*, 39 Ala. 115; *Frost v. Carter*, 1 Johns Cas. 73; *Bailey v. Loeb*, 11 B. R. 271; s. c. 2 Woods, 578; *Lansing v. Prendergast*, 9

the petition and up to the time of the entry of such judgments.¹

b Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct,² and may thereafter be proved and allowed against his estate.

SEC. 64. Debts which have Priority.³—*a* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of

Johns. 127; *Auriol v. Mills*, 4 T. R. 94; *Bosler v. Kuhn*, 8 Watts & S. 183). "Until the end of the term, or until the installment period when the rent is payable, not even a debt is owing" (*Lansing v. Prendergast*, *supra*, citing *Perry v. Aldrich*, 13 N. H. 350; *Russell v. Falryar*, 28 N. H. 545; *Wood v. Pardridge*, 11 Mass. 488; *Fitchburg Factory v. Melom*, 15 Mass. 268; *Van Wickland v. Paulson*, 14 Barb. 654; *Jacques v. Short*, 20 Barb. 269, 279). These cases are founded on the theory that each installment is a distinct debt, and that the contract relations existing between the landlord and tenant are not impaired by an adjudication in bankruptcy, and that the rent thereafter becoming due may be collected from the bankrupt out of after-acquired property (*Lansing v. Prendergast*, *supra* and *cases cited*). Under the present Act, the same conclusion is reached as to future installments, though based upon the hypothesis that the relation of landlord and tenant ceases on adjudication and that the bankrupt is absolved from all contractual relations with, and from all personal obligations to, the landlord, growing out of the lease (*In re Jefferson* [D. C.], 1 N. B. News, 288; s. c. 93 Fed. Rep. 948. See also *in re Ellis* [D. C.], 98 Fed. Rep. 967, citing and approving *ex p. Houghton*, 1 Low. 554, Fed. Cas. No. 6,725). Foreigners stand upon the same footing as Americans so far as proving claims is concerned. They are not entitled to prove claims if they have received a preference until the same is surrendered, even though the preference was upon a debt different from that sought to be proved (*In re Bugbee*, 9 B. R. 258 and *cases there cited*; *ex p. Dickson*, 1 Rose, 98; *ex p. Hardenburgh*, 1 Rose, 204).

Where real estate is subject to a lien for taxes, paramount to a mortgage thereon, the taxes cannot be paid out of the general fund to the prejudice of the general creditors (*In re Veitch et al.* [D. C.], 101 Fed. Rep. 251).

An attorney's fee for services rendered a creditor may be allowed as a lien on the distributive share of such creditor (*In re Rude* [D. C.], 101 Fed. Rep. 805).

¹This is a new provision. Under former Acts there was much difference of judicial opinion as to whether such debts were provable. The cases become unimportant in view of this express provision. (See *in re McBryde* [D. C.], 99 Fed. Rep. 686.)

²The claims must be liquidated by the court, not by the creditor (*In re Smith*, 6 Ben. 187; *in re Clough*, 2 Ben. 508), and until liquidated, are not provable (*Beers v. Hanlin* [D. C.], 99 Fed. Rep. 695; *in re Silverman* [D. C.], 101 Fed. Rep. 219).

An alleged claim for damages for breach of contract will not be liquidated when the purpose is to charge the bankrupt with rent to accrue under a lease for an unoccupied period (*In re Arnstein et al.* [D. C.], 101 Fed. Rep. 706).

³For analogous provisions, see R. S. §5101; Act of 1800, §62; of 1841, §5; of 1867, §28.

dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.¹

b The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1)² the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration,³ including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reason-

¹Where taxes for the current year are due on merchandise at the time the same is sold by the trustee, the bankruptcy court will direct that they be paid by the trustee, though assessed in the name of the purchaser (*In re Conhaim* [D. C.], 100 Fed. Rep. 268).

²Until otherwise judicially determined, it must be assumed under the existing law that all debts due to the United States upon whatever the same may be founded have priority to those specified in this paragraph. Section 3466 of the U. S. Revised Statutes provides: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied, and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." This statute was taken from the Judiciary Act of March 3, 1797. The section has never been repealed. The courts have construed the section to be general, without qualification and paramount to bankruptcy acts (*U. S. v. Lewis*, 92 U. S. 618; s. c. 13 B. R. 33), the United States neither being bound by bankruptcy acts nor required to prove its claims (*U. S. v. Herron*, 20 Wall. 251. See also as to the construction of this section *U. S. v. Fisher*, Cranch, 358; *U. S. v. Hooe*, 3 Cranch, 73; *Harrison v. Sterry*, 5 Cranch, 289; *Prince v. Barillett*, 8 Cranch, 431; *U. S. v. Bryan*, 9 Cranch, 374; *Thelasson v. Smith*, 2 Wheaton, 396; *U. S. v. Howland*, 4 Wheaton, 108; *Connard v. Ins. Co.*, 6 Pet. 386; *Hunter v. U. S.*, 5 Pet. 173; *U. S. v. State Bank*, 6 Pet. 29; *U. S. v. Hack*, 8 Pet. 271; *Brent v. Bank of Washington*, 10 Pet. 596; *Beaston v. Farmers' Bank*, 12 Pet. 102). The priority of the United States created by this section, attaches to all claims it may have, legal or equitable (*In re Rosey*, 6 Ben. 507; s. c. 8 B. R. 509; *Howe v. Sheppard*, 2 Sumner, 133-142), even though not due but payable in the future (*U. S. v. State Bank of N. C.*, 6. Pet. 29).

³The necessary expenses of an attaching creditor for storing the property attached after the dissolution of his lien by adjudication in bankruptcy has been held to be a provable claim, but not one entitled to priority as costs of administration (*In re Hirsch* [D. C.], 96 Fed. Rep. 468).

able attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow;¹ (4) wages due to workmen, clerks, or servants, which have been earned within three months before the date of the commencement of proceed-

¹The attorney fee here provided for is entitled to priority over a claim for rent against the bankrupt which had become a lien upon a bankrupt's property by law more than four months prior to the filing of the petition (*In re Duncan* [D. C.], 1 N. B. News, 340), and, in fact, all costs and expenses of administration have priority over liens (*In re Tebo* [D. C.], 101 Fed. Rep. 419). An attorney fee will be allowed for legal services actually rendered for preservation of the property in voluntary proceedings pending the appointment of the trustee when it clearly appears that such services were beneficial to the creditors, but not when rendered for the benefit of the bankrupt himself (*In re Beck* [D. C.], 1 N. B. News, 338; s. c. 92 Fed. Rep. 889). The fee for legal services connected with the filing of the petition, it was held under the former Act, was not entitled to priority (*In re Hirschberg*, 2 Ben. 466; *in re Handell*, 15 B. R. 71), but under the present Act, being part of the expenses of administration, it has priority (*In re Tebo* [D. C.], 101 Fed. Rep. 419; *in re Scott* [D. C.], 1 N. B. News, 353), and must be paid though the bankrupt gets into contempt or absconds (*In re Mayer* [D. C.], 101 Fed. Rep. 695). The allowance of the attorney fee is not discretionary with the referee (*In re Curtis et al.* [C. C. A.], 100 Fed. Rep. 784), except as to amount (*In re Tebo* [D. C.], 101 Fed. Rep. 419). Counsel employed by the trustee may also be allowed fees to a reasonable amount as part of the costs of administration, and such fees may be determined by the referee *ex parte*, without notice to creditors (*In re Stotts* [D. C.], 1 N. B. News, 326; s. c. 93 Fed. Rep. 438; *in re Little River Lumber Co.* [D. C.], 101 Fed. Rep. 558), though when the assets are only sufficient to pay labor claims, they will not be allowed to an attorney engaged by the trustee, against the objection of the labor claimants, to undertake a discovery of concealed assets. The expenses incurred in such a proceeding should be borne by the creditors for whose benefit it was undertaken (*In re Rozinsky et al.* [D. C.], 101 Fed. Rep. 229). In involuntary proceedings, if it appears that the bankrupt performed the services required of him under the Act, the court may allow his attorney a reasonable fee, otherwise a fee will not be allowed such attorney even when recommended by the referee (*In re Woodard* [D. C.], 1 N. B. News, 430). If the creditors' petition be dismissed, costs are taxable under Rule XXXIV; but counsel fees in addition to costs will not be allowed defendant's attorney except where a receiver of the defendant's property was appointed before adjudication (*In re Ghigliione* [D. C.], 1 N. B. News, 351; s. c. 93 Fed. Rep. 186). As to the reasonableness of an attorney's fee, it has been held that a deposit fee advanced to the clerk is reasonable, but that fees for sending out notices of creditors' first meeting, for attending such meeting and resisting allowance of other claims on behalf of other creditors, or for services in inducing bidders to attend a sale of the bankrupt's property are not reasonable (*In re Harrison Mercantile Co.* [D. C.], 1 N. B. News, 382; s. c. 95 Fed. Rep. 123).

A creditor deeming the charges and expenses of a receiver excessive, may file exceptions thereto with the referee (*In re Reliance Storage & Warehouse Co.* [D. C.], 100 Fed. Rep. 619).

ings, ' not to exceed three hundred dollars to each claimant;

An attorney for a creditor who successfully prosecutes a claim against the trustee's objection, is entitled to a lien for his services on his client's distributive share, and the court may fix the amount or allow a jury to do so (*In re Rude* [D. C.], 101 Fed. Rep. 805).

A court will not, ordinarily, in the first instance, give any direction to a trustee in the matter of the employment of an attorney. The trustee must exercise a reasonable judgment as to the necessity for securing the assistance of counsel,—such judgment as a man of ordinary prudence would use in the transaction of his own business (*In re Abram* [D. C.], 103 Fed. Rep. 272).

The three months time limit prevails against a State statute which contains no time limit (*In re Rouse, Hazzard & Co.* [C. C. A.], 1 N. B. News, 75; s. c. 91 Fed. Rep. 96). The wages must have been earned, in order to have priority, within the three months preceding the filing of the petition in bankruptcy, notwithstanding a State statute giving priority to wages earned within a year (*In re Marshall Paper Co.* [D. C.], 1 N. B. News, 294; s. c. 95 Fed. Rep. 119). If a minor entitled to priority for wages be not manumitted, his father will be a creditor entitled to such priority (*In re Harthorn*, 4 B. R. 103). By the term used in this subdivision, "workmen, clerks or servants", it was undoubtedly intended to give priority to "wage-earners", which means individuals who work for salary, or hire, at a rate of compensation not exceeding \$1500 a year (§1[27]), though as yet, there has been no judicial construction of the term. Under a similar English bankruptcy provision, it has been held that workmen who are not hired for any definite time but who work by the job are not entitled to priority (*Ex p. Grelier*, Mont. 264). And it has also been held that when one is entitled to priority for wages, his right thereto will not be vitiated by the fact that he is also further interested in his employer's business in a manner other than as a wage-earner (*Ex p. Hicken*, 3 D. & Sm. 662; *ex p. Harris*, DeG. 165). A somewhat similar case has arisen under the present statute where a priority claim for wages was urged by the manager of a corporation. He was a stockholder, one of the board of directors and the general manager. It was held that he did not sustain the relation of master and servant as contemplated by the statute, having no master over him, he stood in the relation of vice-principal of the corporation. The board of directors voted him a fixed monthly salary as general manager, but it was held that the same was not preferred, he not coming within that class of servants entitled to priority (*In re Grubbs-Wiley Grocery Co.* [D. C.], 1 N. B. News, 381; s. c. 96 Fed. Rep. 183). A like holding was reached in another case where the president's salary was \$700 a year (*In re Carolina Cooperage Co.* [D. C.], 96 Fed. Rep. 950). The actual relation of master and servant does not seem to control, for in neither of the cases last cited did that relation exist, though in other cases the relation did exist, but the employees who were traveling salesmen were held not entitled to priority within the meaning of the Act (*In re Scanlan et al.* [D. C.], 97 Fed. Rep. 26; *in re Greenwald* [D. C.], 99 Fed. Rep. 705). When a State law gives priority to wages, that priority will be recognized by the bankruptcy court as outranking contract liens created upon the bankrupt's property (*In re Byrne et al.* [D. C.], 97 Fed. Rep. 762; *in re Tebo* [D. C.], 101 Fed. Rep. 419). The priority of labor claims ceases if the claim be assigned and held by the assignee at the commencement of bankruptcy proceedings (*In re Westlund et al.* [D. C.], 99 Fed. Rep. 399), but not if reduced to judgment before the petition in bankruptcy was filed, the judgment not being security (*In re Anson* [D. C.], 101 Fed. Rep. 698), or assigned after it is filed (*In re Campbell* [D. C.], 102 Fed. Rep. 686).

The amount due one for selling goods on commission is not entitled to priority as wages (*In re Mayer* [D. C.], 101 Fed. Rep. 227).

and (5) debts owing to any person who, by the laws of the States or the United States, is entitled to priority.¹

c In the event of the confirmation of a composition being set aside, or a discharge revoked,² the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts, which were owing at the time of the adjudication.

SEC. 65. Declaration and Payment of Dividends.³
—*a* Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.⁴

¹When the State law gives priority of payment to the fees incident to attachment or insolvency proceeding, the same is to be recognized under this paragraph (*In re Lewis* [D. C.], 99 Fed. Rep. 935), such priority not being excluded by the provisions of clauses 1, 2, 3 of this paragraph.

The fact that one accepts a note in payment of a debt does not discharge the debt unless the note be paid, and it will not affect the original debt so as to deprive it of priority to which it would otherwise be entitled (*In re Derby* [C. C. A.], 102 Fed. Rep. 808).

²See §12 as to when a bankrupt may offer terms of composition and relative to the confirmation thereof; §13 as to vacating the same; §14 as to the granting of discharges; and §15 as to their revocation. When a composition is set aside or a discharge revoked, the title to the bankrupt's property vests in the trustee (§70d).

³For analogous provisions, see R. S. §§5092, 5093, 5096, 5097; Act of 1800, §§29, 30; Act of 1841, §10; Act of 1867, §§27, 28.

⁴The dividend is to be declared by the referee (§39[1]), and paid by the trustee (§47[9]), though not upon claims of persons contingently liable for the bankrupt except upon satisfactory proof that such payment will diminish *pro tanto* the original debt (Rule XXI[4]). A dividend on which commission to the referee is allowed cannot be declared or paid on secured claims (*In re Ft. Wayne Elec. Corp.* [D. C.], 1 N. B. News, 356; s. c. 95 Fed. Rep. 264). Only claims properly proven and allowed before declaration of dividend can participate in the distribution, and if part of the dividend be held back to pay a creditor who has asked leave to amend his proof, such portion of the dividend may be used for other purposes, the creditor having no lien thereon (*In re Scott* [D. C.], 1 N. B. News, 353). When the estate is ready for distribution, the trustee cannot retain a sum sufficient to pay dividends on claims that are not proved, but which may be filed within a year (*In re Stein* [D. C.], 1 N. B. News, 339; s. c. 94 Fed. Rep. 124). Where one pays a debt after the filing of a petition by another who is jointly liable thereon, and where the person so paying the joint debt is himself indebted to the

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order.

c The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

d Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts.

e A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act.

bankrupt, he must pay the debt due the bankrupt to the trustee, prove his claim for the amount paid in behalf of the bankrupt on the joint debt, and receive from the trustee his proper dividend as other creditors (*In re Bingham* [D. C.], 1 N. B. News, 351; s. c. 94 Fed. Rep. 196). Whenever the facts warrant it, the bankruptcy court may restrain the payment of a dividend declared to afford parties in interest an opportunity to move to vacate the order declaring such dividend (*In re N. Y. Mail, S. S. Co.*, 3 B. R. 280), but a State court can in no manner interfere with the distribution of the bankrupt's assets, the same not being subject to attachment or other process (*In re Bridgeman*, 2 B. R. 252; *Jackson v. Miller*, 9 B. R. 143; *Gilbert v. Lynch*, 17 Blatch. 402). The court will not so act, however, to enable one who has not proved his claim to do so and participate in such dividend (*In re Smith*, 15 B. R. 97).

SEC. 66. Unclaimed Dividends.¹—*a* Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

b Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt;² *Provided*, That in case unclaimed dividends belong to minors, such minors may have one year after arriving at majority to claim such dividends.

SEC. 67. Liens.³—*a* Claims which, for want of record or for other reasons, would not have been valid liens as

¹There were no provisions in any of the previous Acts analogous to those of this section.

²Under the former Act, it was held that where the assets were sufficient to more than pay the creditors in full, interest might be allowed on their claims (*In re Hagan*, 10 B. B. 383).

³For analogous provisions, see R. S. §§5044, 5075; Act of 1800, §63; of 1841, §2; of 1867, §§14, 20. See also §47(2) as to the trustee's duty to reduce the property to money, §57 as to proof and allowance of claims, §70 as to title to property, and Rule XXVIII relative to redemption of property and compounding of claims.

If a litigant in a State court has obtained a lien upon property of a bankrupt on a claim that would not be discharged in bankruptcy, the State court will not stay proceedings since the bankruptcy court has no jurisdiction relative to such claim (*Cont. Nat. Bank v. Katz* [Ill. Sup. Ct.], 1 N. B. News, 165). Nor has it jurisdiction to enforce liens on exempt property which has been set apart or to defend the same from adverse claims (*In re Grimes* [D. C.], 96 Fed. Rep. 529). If the exempt property has not been set apart, the bankruptcy court would have jurisdiction. (See §6 and notes.) With reference to property of the bankrupt having liens thereon, other than such as may have been set apart, the bankruptcy court may order the trustee to sell the same free from liens, the liens to attach to the proceeds (*In re Worland* [D. C.], 1 N. B. News, 316; s. c. 92 Fed. Rep. 893; *Southern Loan & Trust Co. v. Benbow* [D. C.], 96 Fed. Rep. 514). When a mechanic's lien or one for labor comes into being solely by virtue of a State law, that law should be strictly followed to preserve the lien, otherwise it will be lost and the bankruptcy court will not restore it (*In re Kerby-Dennis Co.* [D. C.], 1 N. B. News, 301; s. c. [C. C. A.], 95 Fed. Rep. 116; *in re Dey*, 9 Blatch. 285; s. c. 3 Ben. 450; s. c. 3 B. R. 305; *in re Brunquest*, 14 B. R. 529). If the lien, for whatever it may be, depends upon instituting legal proceedings, the same must be begun in the State court, or if there forbidden by the bankruptcy court, then before the latter (*In re Brunquest*, 14 B. R. 529). When the lien is for rent to accrue and created by statute, it becomes dissolved by the adjudication in bankruptcy (*In re Jefferson* [D. C.], 1 N. B. News, 288; s. c. 93 Fed. Rep. 948). If it is for rent and attaches by statute to goods and chattels upon any messuage, it cannot be enforced unless the property on which it so attaches is subject to execu-

against the claims of the creditors of the bankrupt shall not be liens against his estate.¹

b Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

c A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession,

tion or distress (*In re Meyers* [D. C.], 102 Fed. Rep. 869). So, if the lien is incident to the possession, the same will be lost if the lienor voluntarily surrenders the property to the trustee (*In re Mitchell*, 8 B. R. 47). If such property be delivered to one other than the trustee, however, for a specific purpose, such as for collection or reduction to money, the lien attaches to the proceeds and may be enforced against whomsoever becomes possessed of such proceeds, including the referee (*Clark v. Iselin*, 9 B. R. 19; s. c. 10 Blatch. 204; s. c. [affirmed] 11 B. R. 337; s. c. 21 Wall. 360). The trustee takes the bankrupt's assets subject to all equities, liens or encumbrances whether created by operation of law or the act of the bankrupt existing against the property at the time the bankrupt loses title to it (*Yeatman v. Savings Inst.*, 95 U. S. 764; s. c. 17 B. R. 187; *Brown v. Heathcote*, 1 Atk. 160; *Mitchell v. Winslow*, 2 Story, 630; *Gibson v. Warder*, 14 Wall. 244; *Cook v. Tullis*, 18 Wall. 332; *Donaldson v. Farwell*, 93 U. S. 631; *Jerome v. McCarter*, 94 U. S. 734; *Winsor v. McLellan*, 2 Story, 492; *Goddard v. Weaver*, 1 Woods, 260; *in re Davis*, 2 B. R. 391; *in re Waddell*, 1 N. Y. Leg. Obs. 53; *Peck v. Jenness*, 7 How. 612; *Downer v. Brackett*, 21 Vt. 599; *in re Emslie* [C. C. A.], 102 Fed. Rep. 291; *in re Horton* [C. C. A.], 102 Fed. Rep. 986; *Chattanooga Nat. Bank v. Rome Iron Co.* [C. C.], 102 Fed. Rep. 755). Except where the statute otherwise provides, lienors' rights remain unimpaired, though the lienors may be required, in most cases, to enforce them in bankruptcy courts (*Ex p. Christy*, 3 How. 292; *in re Stuyvesant Bank*, 12 Blatch. 179; s. c. 10 B. R. 399; s. c. 49 How. Pr. 133).

¹This paragraph has been construed as depending upon the provisions of a State Statute as to the preservation of a lien. Where a mortgage was executed four months and four days but filed less than two hours before the beginning of a voluntary bankruptcy proceeding by the mortgagor, the same was held to be a valid lien as against the general creditors (*In re Wright* [D. C.], 1 N. B. News, 381; s. c. 96 Fed. Rep. 187). This was upon the conclusion that under the law of the State [Ga.], a mortgage would be good as against the general creditors if it were not filed at all, the filing merely affecting other liens, without conferring upon the trustee any greater rights than were possessed by the creditors whom he represented in his efforts to have the lien declared void. The same conclusion was reached, as to the same State, under the former bankruptcy Act (*Johnson's Assignee v. Patterson*, 2 Woods, 443). See also relative to the question here involved *Bump on Bankruptcy* [11 ed.], 792; *Stewart v. Platt*, 101 U. S. 731). The court of bankruptcy, as to the status and effect of unrecorded mortgages, will follow the rule of law adopted by the State where the mortgaged property is

which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt¹ if (1) it appears that said lien was obtained and permitted² while the defendant was insolvent and that its existence and enforcement will work a preference³ or (2) the party or parties to be benefited

situated (*In re Leight et al.*, [D. C.], 96 Fed. Rep. 806; *in re Adams* [D. C.], 97 Fed. Rep. 188; *in re Wright*, *supra*; *Johnson's assignee v. Patterson*, *supra*).

Where a mortgage is given more than four months before the petition is filed for a sum greater than the amount actually due in apprehension of the results of a damage suit, the same is fraudulent, and no part of it can be enforced as a lien (*In re Hugill* [D. C.], 100 Fed. Rep. 616).

¹See notes to clause *f*. It should be noticed that the liens dissolved by adjudication under this paragraph are such as spring from legal proceedings commenced within four months before the filing of the petition. This paragraph, it has been held, does not necessarily refer to the time of the beginning of the action or suit itself, but to the beginning of that part or branch of the proceedings whose special object is to secure a lien (*In re Higgins* [D. C.], 97 Fed. Rep. 775). This construction does not seem to be in harmony with the language of the Act itself, a fact which the court recognized in the decision by saying that "the mere letter of the statute must yield to the reason and spirit of it." Other courts have found "the reason and spirit" of the Act in its express language and held that the lien may attach or come into existence within the four months and be valid if the suit or proceeding from which it arises had been commenced more than four months before the filing of the petition in bankruptcy (*In re DeLue* [D. C.], 91 Fed. Rep. 510; *in re O'Connor* [D. C.], 95 Fed. Rep. 943; *in re Easley* [D. C.], 1 N. B. News, 230; s. c. 93 Fed. Rep. 419. See also *in re Fallerath* [D. C.], 1 N. B. News, 292; s. c. 95 Fed. Rep. 121). As affecting the dissolution of a lien, it is of no consequence that the creditor knew or had reason to believe that the debtor was insolvent, that question is immaterial so far as the provisions of this paragraph are concerned (*In re Burrus* [D. C.], 97 Fed. Rep. 926). When a lien attaches more than four months before the filing of the petition, the same will not be impaired by an adjudication (*In re Blumberg* [D. C.], 1 N. B. News, 258; s. c. 94 Fed. Rep. 476; *in re Dunavant* [D. C.], 96 Fed. Rep. 542; *in re Schnepf*, 1 B. R. 190; *Webster v. Woolbridge*, 3 Dill. 74; *Marshall v. Knox*, 16 Wall. 551; s. c. 8 B. R. 97; *Clark v. Iselin*, 21 Wall. 360; s. c. 11 B. R. 337; *Catlin v. Hoffman*, 9 B. R. 342; *Wilson v. City Bank*, 9 B. R. 97; *in re Bernstein*, 1 B. R. 199), nor where it attached before the bankruptcy law went into effect (*In re Terrill* [D. C.], 100 Fed. Rep. 778). The existence of all liens is determined by the State law, and to be recognized and protected under the bankruptcy law, they must have been actually perfected at the time the petition is filed (*Pennington v. Sale*, 1 B. R. 572; *in re Dey*, 3 B. R. 305; s. c. 3 Ben. 450; s. c. 9 Blatch. 285; *in re Bernstein*, 1 B. R. 199; *in re Smith*, 1 B. R. 599; *in re Schnepf*, 1 B. R. 190; *Jones v. Leach*, 1 B. R. 595; *in re Ellis*, 1 B. R. 555; *in re Housberger*, 2 B. R. 92; *in re Lesser et al.* [D. C.], 100 Fed. Rep. 433; *in re Emalie et al.* [C. C. A.], 102 Fed. Rep. 291).

²The word "permitted" as here used is synonymous with "suffered" (*In re Arnold* [D. C.], 1 N. B. News, 334; s. c. 94 Fed. Rep. 1001).

³The lien will not be affected unless it works a preference. So where perishable property was taken on an attachment, sold and the proceeds deposited in court.

thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act;¹ or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.²

d Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.³

The attaching creditors waived their lien and agreed with the insolvent and all the other creditors to distribute such proceeds *pro rata*. Judgment was entered under this arrangement and all but two of the creditors accepted their portion in full satisfaction. The creditors dissenting were held not to be injured, and though an adjudication in bankruptcy was had, the trustee was not entitled to file a bill to affect the distributive shares already accepted (*Botts v. Hammond et al.* [C. C. A.], 99 Fed. Rep. 916).

¹“In fraud of the provisions of this act” is a phrase which occurred in the former bankruptcy law (R. S. §5128). No definition was ever attached to it by the courts, the fraud being sought in the facts in each individual case. Under the former statute, an act committed in fraud of the bankruptcy law was an act of bankruptcy. That is not true under the present Act. In view of this, it may be questionable whether the decisions under the former Act are applicable to the present. The decisions referred to establish the conclusion that any act, whether committed by one who is insolvent or one who is not insolvent, is in fraud of the bankruptcy law if it operates to prevent an equal distribution of a bankrupt's assets among his creditors. (See *Toof v. Martin*, 13 Wall. 40; s. c. 6 B. R. 49; s. c. 1 Dill. 203; s. c. 4 B. R. 488; *Wager v. Hall*, 16 Wall. 584; s. c. 5 B. R. 181; s. c. 3 Biss. 28; *Beattie v. Gardner*, 4 B. R. 323; s. c. 2 Ben. 479; *Buchanan v. Smith*, 16 Wall. 277; s. c. 7 B. R. 513; s. c. 8 Blatch. 153; s. c. 4 B. R. 397; *in re Black & Secor*, 1 B. R. 353; s. c. 2 Ben. 196; *Foster v. Hackley*, 2 B. R. 406).

²*In re Hammond* [D. C.], 98 Fed. Rep. 845.

³When a mortgage is given in good faith to secure future purchases of goods, it will be valid to the extent of the advances made in reliance upon it (*Marvin v. Chambers*, 12 Blatch. 495; s. c. 13 B. R. 77), if the transaction is free of fraud (*In re Wolf* [D. C.], 98 Fed. Rep. 84), otherwise it will not be enforceable for any amount (*In re Hugill* [D. C.], 100 Fed. Rep. 616). If a mortgage be given upon property to be thereafter acquired by the mortgagor, an equitable lien will attach

e That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property

as soon as the title thereto vests in the mortgagor, "if the agreement [mortgage] is founded on good and valuable consideration, unless it infringes some rule of law, or will prejudice the rights of third persons" (*Barnard v. Norwich & Worcester R. Co.*, 14 B. R. 469, citing *Pennock v. Coe*, 23 How. 117, 138; *Mitchell v. Winslow*, 2 Story, 630, 644. See also *Brett v. Carder*, 14 B. R. 301, reviewing authorities and distinguishing *Moody v. Wright*, 54 Mass. 17, from *Mitchell v. Winslow*, *supra*). There are certain liens which do not seem to be affected by the bankruptcy law, and which the bankruptcy court will recognize and enforce. Among such is a vendor's lien for the purchase price (*In re Hutto*, 3 B. R. 787), a conveyance of property within four months pursuant to a prior contract under which the transferee advanced the money with which the property was acquired (*Sabin v. Camp* [D. C.], 98 Fed. Rep. 974), a corporation's lien for unpaid stock when a statute and the articles of association authorize the creation thereof (*In re Dunkerson*, 4 Biss. 227), a mortgagee's equitable lien for rents and profits when the security is insufficient (*In re Snedaker*, 4 B. R. 168; *in re Sacchi*, 6 B. R. 497; s. c. 43 How. Pr. 250; *in re Bennett*, 12 B. R. 257), an attorney's lien upon papers prepared for a client (*In re N. Y. Mail Steamship Co.*, 12 B. R. 74; *Rogers v. Winsor*, 6 B. R.

shall pass to the assignee¹ and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.*

f That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title

246), a pledgee's lien upon pawned property (*Jerome v. McCarter*, 15 B. R. 546; *Yeatman v. Savings Inst.*, 95 U. S. 764; *Clark v. Iselin*, 21 Wall. 360; s. c. 11 B. R. 337), though the property pledged may be taken by the trustee into his possession and the creditor can effectually enforce his lien in the bankruptcy court (*In re Cobb* [D. C.], 96 Fed. Rep. 821), not being obliged to follow the course of procedure prescribed by the State statute under which the lien arises (*In re Falls City Shirt Co. et al.* [D. C.], 98 Fed. Rep. 592), a workman's lien for labor performed upon goods which are in his possession (*In re Lowensohn* [D. C.], 100 Fed. Rep. 776), and a lessor's lien for rent when authorized by a State statute (*Marshall v. Knox*, 16 Wall. 551; s. c. 8 B. R. 97), though the lien will be waived if the landlord has taken security for the debt on which the lien is founded (*In re Wolf* [D. C.], 98 Fed. Rep. 74), and ignored if the State law does not recognize it (*In re Ruppel* [D. C.], 97 Fed. Rep. 778). The lien must be for rent due, a lien for that to accrue in the future being invalidated by the adjudication in bankruptcy (*In re Jefferson* [D. C.], 1 N. B. News, 288; s. c. 93 Fed. Rep. 948). The trustee may sell mortgaged property, under the order of the court, subject to such liens as may burden it (*In re Booth* [D. C.], 98 Fed. Rep. 943), or free of liens when it appears that such sale will be to the interest of the general creditors (*In re Styer* [D. C.], 98 Fed. Rep. 290).

¹ "Assignee" should read "trustee" (1 N. B. News, 42).

*The payment of money by a debtor on a valid pre-existing debt, under circumstances which do not make it technically a preference, is not a "transfer of property" in such sense that the same may be recovered for the benefit of the estate within the meaning of this paragraph (*Blakey v. Boonville Nat. Bank* [D. C.], 95 Fed. Rep. 267).

obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.¹

¹The subject-matter of this and that of paragraph *c* is substantially the same, paragraph *f* making void all the liens which paragraph *c* declares shall be dissolved. The presence of these two provisions in the same Act would ordinarily give rise to the conclusion that Congress meant to distinguish between classes of liens. It is difficult to find such a distinction, and had such been the intention, it is probable that the same would have been expressed in more comprehensive language. The presence of these two paragraphs is more likely to be due to inadvertence than to intention. Paragraph *c* was in the House bill and *f* in the Senate bill. Each in the respective bills was intended, it is said, to cover the same subject-matter. Both paragraphs appeared in the House bill, which became the present bankruptcy Act, after the conference between the House and Senate committees. A distinction has been sought to the effect that the provisions of this paragraph did not apply to both voluntary and involuntary proceedings, but the courts hold that they do (*In re Vaughan* [D. C.], 97 Fed. Rep. 560; *in re Dobson* [D. C.], 98 Fed. Rep. 86; *in re Rhoads* [D. C.], 98 Fed. Rep. 399; *in re Lesser et al.* [D. C.], 100 Fed. Rep. 433). The real difference between the two paragraphs is to be found in the fact that one refers to liens obtained through legal proceedings against an insolvent debtor within four months prior to the filing of a petition in bankruptcy against him, and the other to liens created by the act of the bankrupt himself (*In re Emalie et al.* [C. C. A.], 102 Fed. Rep. 291). The liens affected by this paragraph include only such as are obtained through strictly legal proceedings, and not such as arise out of quasi legal proceedings, as mechanics' liens (*In re Emalie et al.* [C. C. A.], 102 Fed. Rep. 291, over-ruling same case in [D. C.] 97 Fed. Rep. 929; s. c. 98 Fed. Rep. 716. See also *in re Kavanaugh* [D. C.], 99 Fed. Rep. 928).

Whether the adjudication in bankruptcy, of itself, dissolves the liens specified in paragraph *c* or renders null and void those designated in paragraph *f* is a question that must be hereafter settled by the weight of authorities. Thus far, it has been held that an adjudication in bankruptcy dissolves such liens without further proceedings (*Bear et al. v. Chase* [C. C. A.], 99 Fed. Rep. 920; *in re Kemp*, 101 Fed. Rep. 689). Should the weight of authority, however, favor the conclusion that the adjudication did not, of itself, so operate, but that further proceedings must be taken to establish the questions of fact specified in these paragraphs, then another question arises as to whether such further proceedings should be taken in the court of bankruptcy or in the courts where the proceedings out of which the liens grew were had. There were several cases that arose under the former Act relative to these questions, but they cannot be cited as direct precedents since they were under a statute very different as to the point involved from the present, the same having reference only to liens of attachment, and providing that they should be dissolved on the qualification of the assignee, no question of fact being involved (Act of 1867, §14; R. S. §5044). The former Act, though, did contain provisions similar to those of paragraphs *c* and *f* with reference to liens arising through means other than legal proceedings (Act of 1867, §35). The decisions under the former Act relative to the dissolution and nullification of liens tend to the conclusion that before such liens become affected proceedings other than the mere adjudication must be had and that the same should be prosecuted before the court having jurisdiction of the proceedings from which the lien arose (See *Ballin v. Ferst*, 55 Geo. 546; *Kent v. Downing*, 10 B. R. 538; *Johnson v. Bishop*, 1 Woolworth, 324; s. c. 8 B. R. 533; *Marshall v. Knox*, 8 B. R. 97; s. c. 16 Wall. 551; *Valliant v. Childress*, 11 B. R. 317; s. c. 21 Wall. 643; *Bracken v.*

SEC. 68. Set-offs and Counterclaims.—*a* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.*

Johnston, 15 B. R. 106; *in re Housberger*, 2 B. R. 92; s. c. 2 Ben. 504; *Dickerson v. Spaulding*, 15 B. R. 313; s. c. 7 Hun, 288). There can be little doubt but that such a conclusion will be ultimately reached as to the proceedings under the present Act. The language of paragraph *c* seems to imply this, for it provides that under certain conditions, which cannot be made apparent by the adjudication, the lien shall not be dissolved, but that the trustee shall be subrogated to the rights of the holder of such lien. It will at least be necessary, before a creditor can be deprived of his lien, to give him a right to contest the question as to whether the bankrupt was insolvent at the time the lien attached and whether it operates as a preference, otherwise the Act itself would be void in authorizing the appropriation of private property without due process of law.

It has been held under this paragraph, that the title of a *bona fide* purchaser at an execution sale, an execution having been issued and a levy having been made within the four months, will not be affected, though the proceeds of such sale belong to the bankrupt's estate (*In re Kenney* [D. C.], 95 Fed. Rep. 427; s. c. 1 N. B. News, 401; s. c. [on rehearing] 97 Fed. Rep. 554). The same conclusion was reached where perishable property taken on attachment was sold and the proceeds paid into court (*Bear et al. v. Chase* [C. C. A.], 99 Fed. Rep. 920; *Batts v. Hammond et al.* [C. C. A.], 99 Fed. Rep. 916).

*For analogous provisions, see Act of 1800, §42; of 1841, §5; of 1867, §§20, 21; R. S. §5073.

*Under the former Act, it was said that the subject of the analogous section was only a declaration of the general doctrine of set-off, and that it was "not intended to enlarge the doctrine of set-off, or to enable the party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it" (*Sawyer v. Hoag* [U. S. Supreme Ct.], 9 B. R. 145; s. c. 17 Wall. 610). This decision is important in that it fixes the limitations of the Act and emphasizes the fact that set-offs coming within its purview are not only those founded on statutory provisions, but such also as courts of equity recognize. Any mutual debt, demand or claim (§1[11]) provable in bankruptcy (§63) and authorized by principles of law or equity may be set-off under this section (*Sawyer v. Hoag*, *supra*; *Sheldon v. Rothschild*, 8 Taunt. 157; *Munger v. Albany Bank*, 85 N. Y. 580; *Bittlestone v. Temmis*, 1 C. B. 380; *Collins v. Jones*, 10 B. & C. 777; *ex p. Wagstaff*, 13 Ves. 65; *ex p. Prescott*, 1 Atk. 230; *Drake v. Rollo*, 3 Biss. 273; s. c. 4 B. R. 689; *in re City Bank*, 6 B. R. 71; *in re Dillon*, [D. C.], 100 Fed. Rep. 627), unless the same comes within the inhibition of paragraph *b*. This includes claims liquidated under the provisions of §63*b*, unliquidated claims not being provable or allowable as set-offs (*Bell v. Carey*, 8 C. B. 887). It is immaterial that the debt may not be due, as required by most statutory provisions, since such debts are provable (§63[1]; *Collins v. Jones*; *ex p. Wagstaff*; *Sheldon v. Rothschild*, *singuli supra*). The former bankruptcy Act provided that a creditor who had proved a claim in bankruptcy could not thereafter bring suit therefor against the bankrupt (Act of 1867, §21). Under that provision it was held that the creditor could not set-off the amount so allowed against the trustee in an action to recover of such creditor a debt which he owed to the bankrupt. This holding was upon the conclusion that such off-set would amount to a cross-suit (*Russell v. Owen*, 61 Mo. 185; s. c. 15 B. R. 322, citing *Brown v. Bank*, 6 Bush [Ky.], 198). The

b A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable

effect of this decision under that Act was a waiver of the amount that might have been off-set, by failure on the creditor's part to show, in his proof of claim, that the bankrupt had an unsatisfied claim against him. The provisions of the former Act were substantially the same as those of the present relative to off-sets, though the present Act contains no provisions, as did the former, prohibiting the creditor from enforcing his allowed claim. In view of this, the holding in *Russell v. Owen* may not be applicable to the present Act, though there can be but little question that the same ruling would be applied for failing to disclose his indebtedness to the bankrupt as he is commanded to do by the language of this section which provides that "the account shall be stated."

The feature with which most trouble is likely to be met in the consideration of set-offs is that of mutual debts and mutual credits. While the questions have come up under former Acts, the courts do not seem to have attached a fixed definition to either term, having rested their conclusions largely on the facts in each individual case. To be mutual, the debts and credits "must be in the same right" (*Sawyer v. Hoag*, 9 B. R. 145; s. c. 17 Wall. 610). What seems to be meant by this is that the debts and credits must be due from and owing to persons between whom the relation of debtor and creditor exists to such an extent that the one seeking to set-off could recover on his claim in an action brought in his own name (*West v. Pryer*, 2 Bing. N. C. 455; *ex p. Bailey*, 1 M. D. & D. 263; *ex p. Prescott*, 1 Atk. 231; *Jenkins v. Armour*, 6 Biss. 312; s. c. 14 B. R. 276; *Drake v. Rollo*, 3 Biss. 276; s. c. 4 B. R. 689; *Scammon v. Kimball*, 8 B. R. 337; s. c. 5 Biss. 431; *Munger v. Albany Bank*, 85 N. Y. 580; *Key v. Flint*, 8 Taunt. 23; *Sparkhawk v. Drexel*, 12 B. R. 450; *in re Catline*, 3 B. R. 540; *Rose v. Hart*, 8 Taunt. 499; *Murray v. Riggs*, 15 Johns. Rep. 571; *in re Dow*, *ex p. Whiting*, 14 B. R. 307 and cases there cited; *Groom v. West*, 8 Ad. & E. 758; *Russell v. Bell*, 8 Mees. & W. 277). That relation is not present in a case where payments are made from time to time to apply on a running account (*In re Christensen* [D. C.], 101 Fed. Rep. 802). The courts do not place any limitation upon the manner in which the debt to be set-off must have arisen other than that it must be such as is provable in bankruptcy. A banker may set-off against deposits claims which he may have against a depositor for loans (*In re Bank of Madison*, 9 B. R. 184; *in re Petrie*, 7 B. R. 332; *Denman v. Boylston*, 5 Cush. 194; *in re Myers et al.* [D. C.], 99 Fed. Rep. 691), and he may set-off such claims, not only against deposits, but also against any proceeds coming into his hands from collections (*In re Farnsworth*, 14 B. R. 148). This right was based upon the theory that the full amount of the deposits and funds in the banker's hands did not belong to the bankrupt, but only the amount that exceeded the indebtedness to the bank. Where the banker treated the whole of the deposits as belonging to the bankrupt and accepted a check against such deposit on the eve of bankruptcy, knowing the depositor to be insolvent, he waived his right to off-set and such check was declared a preference the amount of which the trustee was entitled to recover (*Traders' Bank v. Campbell*, 6 B. R. 353; s. c. 14 Wall. 87). This right of a creditor to set-off claims against property in his hands is not confined to bankers alone. Any "creditor, who at the time of the bankruptcy has in his hands goods or chattels of the bankrupt with a power of sale, or chooses in action with a power of collection, may sell the goods or collect the claims and set them off against any debt which the bankrupt owes him (at the time of bankruptcy), and this although the power to sell or collect would have been revocable by the bankrupt before his bankruptcy; in other words, the very fact of bankruptcy, in such cases, gives a sort of lien which did not exist before" (*In re Dow*, *ex p. Whiting*, 14 B. R. 307). The right to sell the goods or chattels, however, must

against the estate;¹ or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.²

exist before the petition in bankruptcy is filed, otherwise the set-off will not be recognized (*Young v. Bank of Bengal*, 1 Moore P. C. 150; s. c. 1 Deac. 622). This right of set-off exists also against any surplus that one may hold after selling property deposited as collateral security, though there may exist an express or implied promise to return the same, unless the property had been deposited for a special purpose which excluded the relation of debtor and creditor and rendered such application of the surplus a fraud or breach of trust (*In re Dow*, *supra*; *Alsager v. Currie*, 12 Mees. & W. 758), as when bills of exchange had been deposited with an attorney for a specific purpose inconsistent with a payment of his bill (*Buchanan v. Findley*, 9 B. & C. 738), or where money had been paid to apply on a secured debt (*Libby v. Hopkins*, 104 U. S. 303), the attorney not being at liberty to apply the proceeds of the bill of exchange to the payment of his own claim, or the creditor to apply the money so paid on an unsecured debt. So, in bankruptcy, the owner of a claim against joint debtors, it has been held, may set the same off against an account which either of such joint debtors may individually have against him, each being liable therefor *in solido* (*Tucker v. Oxley*, 5 Cranch, 34), but he may not set-off a claim which an individual owes him against an account which he owes to the individual and others jointly, because that would be making the joint creditors liable for individual debts, an obligation not recognized by law or equity (*Gray v. Rollo*, 9 B. R. 337; s. c. 18 Wall. 629; *in re Crystal Spring Bottling Co.* [D. C.], 100 Fed. Rep. 265. See also relative to the set-off of joint debts against individual debts *ex p. Twogood*, 11 Ves. 517; *ex p. Christie*, 10 Ves. 105; *ex p. Hanson*, 12 Ves. 346; *ex p. Stephens*, 11 Ves. 24. Also §5 relative to partnerships debts). No debt due to one in a representative capacity, such as guardian, trustee, executor or administrator, can by him be set off against a debt which he owes individually (*Bishop v. Church*, 3 Atk. 610).

¹As to debts provable against a bankrupt's estate, see §63 and notes. The former Act on the subject of set-off had a similar provision, but the language there used was: " * * no set-off shall be allowed of a claim in its nature not provable against the estate." Under that provision one was entitled to set-off a claim if it was *in its nature* provable, though he might not have been able to prove it because of inability to procure evidence (*In re Kingsley*, 1 B. R. 329; s. c. 1 Low. 216), or because he was debarred from so doing for a violation of the provisions of the bankruptcy law (*Clark v. Iselin*, 9 B. R. 19; s. c. 11 B. R. 337; s. c. 21 Wall. 360; s. c. 10 Blatch. 204). Under the general rules of statutory construction, the language of this subdivision would be interpreted so as to deny a set-off of debts not actually provable; though it is believed that such a construction will not be adopted, since bankruptcy acts are sufficiently peculiar in themselves to warrant a variation in the construction of their provisions. They originate under a special constitutional provision, partake of legal and equitable principles, and have heretofore been construed with more liberality than has been accorded to general legislative acts, especially with reference to set-offs (*In re Dow*, *ex p. Whiting*, 14 B. R. 307 and cases there cited).

²The right to set-off will not be affected unless the purchase or transfer comes strictly within the time specified (*Hovey v. Ins. Co.*, 10 B. R. 224; *in re City Bank*, 6 B. R. 71. See also *Hitchcock v. Rollo*, 4 B. R. 692 and authorities there cited).

SEC. 69. Possession of Property.¹—*a* A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.²

When a claim purchased within the four months of the filing of the petition cannot be set-off, the same may be proved as other claims in bankruptcy, in the name of the vendee, who is subrogated to the rights of the vendor (*Ex p. Atkins*, Buch. 479; *ex p. Rogers*, Buck. 490), though it will be subject to such set-offs and equities as existed against it in the hands of the vendor before the assignment (*Smith v. Brinkerhoff*, 6 N. Y. 305; s. c. 18 Barb. 519; *Humphries v. Blight*, 4 Dill. 370; s. c. 1 Wash. C. C. 44; *in re Dow*, *ex p. Whiting*, 14 B. R. 307; *Young v. Bank of Bengal*, 1 Moore, P. C. 150; s. c. 1 Deacon, 622; *Dickson v. Evans*, 6 T. R. 57; *Marsh v. Chambers*, Strange, 1234).

¹For analogous provisions, see Act of 1867, §40; R. S. §5024. See also §3e as to the bond required of a petitioner who seeks to divest the alleged bankrupt of the possession of his property prior to adjudication, and Rule XVIII(3) as to the sale of perishable property.

²The provisions of this section are intended to apply only to the seizure of property in the possession of the bankrupt and not to property that has left his hands prior to the filing of the petition in bankruptcy (*In re Rockwood* [D. C.], 1 N. B. News, 134; s. c. 91 Fed. Rep. 363). While the property is yet in the possession of the bankrupt, the bankruptcy court may, without notice to them, prevent by injunction strangers from interfering therewith (*In re Ulrich*, 6 Ben. 483; s. c. 8 B. R. 15), or enjoin the bankrupt from disposing thereof (*In re Nathan* [D. C.], 1 N. B. News, 326; s. c. 92 Fed. Rep. 590). If the property has left the bankrupt's possession, the court will not so act because adverse claims to the title have intervened (*In re Rockwood*, *supra*; *in re Buntrock Clothing Co.* [D. C.], 1 N. B. News, 291; s. c. 92 Fed. Rep. 886), though if the proof shows

SEC. 70. Title to Property.¹—a The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt,² except in so far as it is to property which is

that no due consideration was paid the bankrupt for the property which left his possession and that the alleged purchasers are selling it off rapidly, jeopardizing the claims of the creditors, the court will appoint a receiver under the provisions of §2(3) of this Act, pending the appointment of a trustee, and it will be his duty to summon witnesses for examination under the provisions of §21, examine the books of the alleged purchasers of the bankrupt's stock and, under the direction of the court, institute the necessary proceedings to recover such property (*In re Fixen & Co.* [D. C.], 96 Fed. Rep. 748).

When a warrant is issued to the marshal, under the provisions of this section, he can seize only the property of the bankrupt. When questions of ownership arise, he must act on his own judgment, for the warrant is no protection to him for a seizure of the property of others (*Marsh v. Armstrong*, 11 B. R. 125; s. c. 20 Minn. 81; *In re Muller & Bretano*, 3 B. R. 329; s. c. Deady, 513. See also *in re Vogel*, 7 Blatch. 18; s. c. 3 B. R. 198; *in re Havens*, 8 Ben. 309; *in re Marks*, 2 B. R. 575). And it is of no consequence, it has been said, that the bankrupt's transfer may be voidable for the transferee's title cannot be questioned on such summary proceedings or until after adjudication (*In re Harthill*, 4 Ben. 448; *Doyle v. Sharp*, 34 Hun. [N. Y.], 312), though as to this there are authorities holding the contrary (*Stevenson v. McLaren*, 14 B. R. 403, citing *Bolander v. Gentry*, 36 Cal. 105; *Hanson v. Herrick*, 100 Mass. 323; *in re Muller & Bretano*, 3 B. R. 329; s. c. Deady, 513; *Foster v. Hackley*, 2 B. R. 406; *in re Hussman*, 2 B. R. 437; *in re Briggs*, 3 B. R. 638).

¹For analogous provisions, see Act of 1800, §§10, 11, 13, 17, 27, 50; Act of 1841, §3; Act of 1867, §14; R. S. §§5044, 5046.

²The title to the bankrupt's property remains in him until he is adjudged a bankrupt. Until that time he may alienate the title unless the petitioners, in involuntary proceedings, file a bond and have the property removed from the alleged bankrupt's possession under the provisions of §3e, or a receiver is appointed under §2(3) and takes possession, which he is entitled to do (*In re Fixen & Co.* [D. C.], 96 Fed. Rep. 748). The title to the property, during the interim between adjudication and the appointment and qualification of the trustee, seems to be in suspension the same as that of an intestate's property before the appointment and qualification of the administrator, the property itself being in the custody of the court, the bankrupt acting as its trustee while holding possession of it (*In re Rosenberg*, 3 B. R. 130; s. c. Ben. 366; *March v. Heaton*, 2 B. R. 180; s. c. 1 Lowell, 278). During this period no one can convey an indefeasible title (*Connor v. Long*, 104 U. S. 228; *Bank v. Sherman*, 101 U. S. 403; *Hampton v. Rouse*, 22 Wall. 263; *Stevens v. Bank*, 101 Mass. 109; *Miller v. O'Brien*, 9 Blatch. 270; s. c. 9 B. R. 26; *in re Lake*, 3 Biss. 204; s. c. 6 B. R. 542; *Chapman v. Brewer*, 114 U. S. 158; *Morgan v. Campbell*, 22 Wall. 381; *McLean v. Rockey*, 3 McLean, 235; *in re Pryor*, 4 Biss. 262; *in re Randall*, 1 Sawy. 56), and no one can be an innocent purchaser, since the adjudication is constructive notice to all concerned (*Hitchcox v. Sedgwick*, 2 Vernon, 156; *Wickersham v. Nicholson*, 14 S. & R. 118), though before such adju-

exempt, to all (1) documents relating to his property;¹ (2) interests in patents, patent rights, copyrights, and trademarks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person;² (4) property transferred by him in fraud of his creditors;³ (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.⁴ *Provided*, That when any bankrupt

dication, the title to property finding its way to innocent purchasers will not be affected when the proceeds thereof stand in lieu of such property (*Bear et al. v. Chase* [C. C. A.], 99 Fed. Rep. 920). If any debtor to the bankrupt pay him during this interim, he does so at his peril for the trustee may treat such payment as a nullity and recover the amount again from such debtor (*Mays v. Mfr's Nat. Bank*, 64 Penn. [14 Smith], 74; s. c. 4 B. R. 660; *Babbitt v. Burgess*, 2 Dill. 169; s. c. 7 B. R. 561; *ex p. Foster*, 2 Story, 158; *Carr v. Gale*, 3 Woodb. & M. 67; *Bramwell v. Eglington*, Law Rep. 1 Q. B. 494; *Exley v. Inglis*, Law Rep. 3 Exch. 247). If the trustee acquires peaceable possession of personal property, such property cannot be thereafter seized under process from a State court (*In re Endel* [D. C.], 99 Fed. Rep. 915). On the other hand, if a State court hold the possession under a decree entered more than four months before adjudication, the court of bankruptcy cannot order the same to be delivered into the possession of the trustee (*Frazier et al. v. Southern Loan & Trust Co.*, 99 Fed. Rep. 707).

¹Although the title to documents relating to the bankrupt's property vests in the trustee, if he prepared them, an attorney's lien for the services is unaffected (*In re N. Y. Mail Steamship Co.*, 2 B. R. 74), and the trustee will not be entitled to possession until the same is satisfied (See §69 and notes thereto relative to the possession of property).

²Under the statutes of Massachusetts, a husband's interest in the real estate of his wife, during her life time and after issue born, is not property which he could convey or assign; it will not vest as assets in his trustee in bankruptcy, and it is not a "Power" within the meaning of this subdivision (*Hesseltine v. Prince* [D. C.], 95 Fed. Rep. 802).

³Property which passes into the hands of a receiver under a State statute providing that a fraudulent transfer of property in contemplation of insolvency shall operate as a general assignment for the benefit of creditors, cannot be taken by a trustee in bankruptcy thereafter appointed on a voluntary petition (*In re Kavanaugh* [D. C.], 99 Fed. Rep. 928).

The title to property fraudulently conveyed within four months before the filing of the petition in bankruptcy, vests in the trustee (*In re Lesser et al.* [D. C.], 100 Fed. Rep. 433; *in re Smith* [D. C.], 100 Fed. Rep. 795), though the same does not so vest when the transfer took place more than four months prior to the filing of such petition (*In re Kindt* [D. C.], 101 Fed. Rep. 107).

⁴The property which becomes vested in the trustee under this subdivision is so diversified that any enumeration in terms more specific than those employed in the Act would be frequently faulty, for property that might be included in one jurisdiction would often be excluded in another, to say nothing of new classes of property coming into existence through industrial and judicial avenues. The language used in this subdivision is broad enough to include every species of property, every vested and contingent interest in and every inchoate right to

shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the

property which the bankrupt "could by any means have transferred or which might have been levied upon and sold under judicial process against him", without reference to its value (*Kinsie v. Winston*, 4 B. R. 84; *Lombard v. Thorp*, 6 Cow. [N. Y.], 46; *Brook v. Hewitt*, 3 Ves. 253; *Willingham v. Joyce*, 3 Ves. 168; *Brandon v. Robinson*, 1 Rose, 197; *ex p. Fuller*, 2 Story, 327; *Brown v. Wood*, 17 Mass. 68; *Ward v. Fuller*, 15 Pick. 185; *Higden v. Williamson*, 3 P. Wms. 132; *ex p. Goldney*, 3 Deac. 570; *Stewart v. Hargrove*, 23 Ala. 429; *in re Gallagher*, 16 Blatch. 410; *in re Myrick*, 3 B. R. 38; *Sanford v. Lackland*, 2 Dill. 6; *Perry v. Jones*, 3 T. R. 88; *Pillow v. Langtree*, 3 Humph. 389; *Lyall v. Miller*, 6 McLean, 482; *in re Brobine* [D. C.], 1 N. B. News, 279; s. c. 93 Fed. Rep. 643; *in re Hollenfels* [D. C.], 94 Fed. Rep. 629; *in re Coffman* [D. C.], 1 N. B. News, 402; *in re Taylor* [D. C.], 95 Fed. Rep. 956; *in re Baudouine* [D. C.], 96 Fed. Rep. 536; *in re Dunavant* [D. C.], 96 Fed. Rep. 542; *in re Daubner* [D. C.], 96 Fed. Rep. 805; *in re Crystal Spring Bottling Co.* [D. C.], 96 Fed. Rep. 945; *in re Steele et al.* [D. C.], 98 Fed. Rep. 78; *in re Fisher* [D. C.], 98 Fed. Rep. 89; *in re Becker* [D. C.], 98 Fed. Rep. 407; *in re Barrow* [D. C.], 98 Fed. Rep. 582; *in re Hammond* [D. C.], 98 Fed. Rep. 845; *in re Wood* [D. C.], 98 Fed. Rep. 972; *in re Diac* [D. C.], 100 Fed. Rep. 770; *in re Emrich* [D. C.], 101 Fed. Rep. 231; *in re Hoadley et al.*, Id., 233; *in re McDonnell*, Id., 239; *in re Wetmore* [D. C.], 102 Fed. Rep. 290; *in re Hamilton et al.* [D. C.], 102 Fed. Rep. 683; *in re Page* [D. C.], 102 Fed. Rep. 746; *in re Shenberger* [D. C.], 102 Fed. Rep. 978; *Parsons on Contracts*, Part II, Ch. XII, §IX). It will not include exempt property, or property, rights or interests in property which the bankrupt could not assign or on which an execution against him could not be levied. Among which may be mentioned the earnings of a manumitted minor son (*In re Dunavant* [D. C.], 96 Fed. Rep. 542), rights to or interests in property that may be of a strictly personal character, by their nature unassignable, as contracts requiring the bankrupt's personal labor, attention or supervision (*People v. Duncan*, 41 Cal. 507), membership in board of trade where no profits ensue to the members except through their own exertions (*In re Sutherland*, 6 Biss. 596), trust funds, estates, or incomes therefrom, for the support of the bankrupt, or himself and family (*Durant v. Mass. Hosp. Life Ins. Co.*, 15 Albany Law J. 436; s. c. 2 Low. 575; s. c. 16 B. R. 324; *Spindle v. Shreve*, 9 Biss. 199; *Broadway Bank v. Adams*, 133 Mass. 170; *Nichols v. Eaton*, 91 U. S. 716; *Twopenny v. Peyton*, 10 Sim. 487; *Godden v. Crowhurst*, 10 Sim. 642), or trust property of any kind (*Bodington v. Costello*, 17 Jur. 781; *Winch v. Keeley*, 1 T. R. 619; *ex p. Copeland*, 3 D. & C. 199; *Whitefield v. Brand*, 16 M. & W. 282), except when the trust property is so mingled as to lose its identity, or when it cannot be traced or ascertained (*Hosmer v. Jewett*, 6 Ben. 208), in which case the beneficiaries become general creditors (*Adams v. Myers*, 1 Saw. 306; *Scott v. Suenam*, Willes, 400. See also *Wood Mowing & Reaping Co. v. Brooke*, 9 B. R. 395; *ex p. Atkins*, 2 Mont. D. & D. 103; *Hornblower v. Proud*, 2 B. & Ald. 327), and estates by curtesy (*Hesseltine v. Prince* [D. C., Mass.], 95 Fed. Rep. 802. *Contra*: See *Jacobson v. Williams*, 1 P. Wms. 383). Whether under leases containing the ordinary covenants not to assign, let or transfer, leasehold interests will pass to the trustee is unsettled, though the tendency of the American decisions, when there is no special covenant to the contrary, favors such practice (*Starkweather v. Cleveland Ins. Co.*, 4 B. R. 341; s. c. 10 A. L. Reg., N. S., 333; s. c. 2 Abb. U. S. 67; *Perry v. Lorillard*, 61 N. Y. 214; *Brichta v. N. Y. Lafayette*

trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of

Ins. Co., 2 Hall, 372; *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 76; Par. on Con. Part. II, Ch. XII, §IX), the English practice being opposed to it (*Hilliard on Bankruptcy*, 141; *Doe v. Bevan*, 3 Maule & S. 353; *Doe v. Smith*, 5 Taunt. 795; s. c. 1 Marshall, 359; *Gormey v. Warren*, 2 Eq. Cas. Abs. 100; *Domett v. Bedford*, 3 Ves. 149; *Wilkinson v. Wilkinson*, 10 Eng. Ch. 258; s. c. 2 Wils. Ch. 57; s. c. Cooper, 201; *Holyland v. Mendes*, 3 Meriv. 184. See also *Starkweather v. Cleveland Ins. Co.*, *supra*). The title which vests in the trustee under this paragraph, with reference to all classes of property, is that which reposed in the bankrupt and his creditors at the time of adjudication. The property in the hands of the trustee is subject to all the burdens, conditions, legal and equitable claims that attached to it in the possession of the bankrupt (*Carr v. Hilton*, 1 Curtis C. C. 230; *Donaldson v. Farwell*, 5 Biss. 451; s. c. 93 U. S. 631; *Trust Co. v. Sedgwick*, 97 U. S. 304; *Phipps v. Sedgwick*, 95 U. S. 3; *Eyster v. Gaff*, 91 U. S. 521; s. c. 13 B. R. 546; s. c. 2 Col. 28; *Lenihan v. Haman*, 55 N. Y. 652; s. c. 11 B. R. 471; s. c. 14 Abbott's Pr. [N. S.], 274; *Hyde v. Woods*, 94 U. S. 523; s. c. 10 B. R. 54; *in re Lyon*, 7 B. R. 182; *in re Foot*, 11 Blatch. 530; *Bloxham v. Sanders*, 4 B. & C. 949; *Smith's Leading Cases*, 432; *Gibson v. Carruthers*, 8 Mees. & W. 321; *Moors v. Albro*, 129 Mass. 9; *Jacobson v. Williams*, 1 P. Wms. 383; *Nicholson v. Eaton*, 91 U. S. 716; *Page v. Way*, 3 Bear. 20; *Piercy v. Roberts*, 1 Myl. & K. 4; *Rippon v. Norton*, 2 Bear. 63; *in re Dow*, 6 B. R. 10, citing *Bacon v. Heathcote*, 1 Atk. 160; *Stewart v. Platt*, 101 U. S. 731; *Yeatman v. Savings Inst.*, 95 U. S. 764; *Montgomery v. Bucyrus Mach. Co.*, 92 U. S. 257; *Strong v. Clawson*, 5 Gilman, 346; *Jewson v. Moulson*, 2 Atk. 417; *Mitford v. Mitford*, 9 Ves. 87; *Worrall v. Marlur*, 1 P. Wms. 459; *Mitchell v. Winslow*, 2 Story, 630; *Winson v. McLellan*, 2 Story, 495; *ex p. Newhall*, 2 Story 363; *Fiske v. Hunt*, 2 Story, 584; *Hayes v. Dickinson*, 15 B. R. 350; s. c. 9 Hun. 277; *in re McKay & Aldus*, 1 Lowell, 345; s. c. 3 B. R. 50; *Kelly v. Scott*, 49 N. Y. 595; *Jenkins v. Pierce*, 98 Ill. 646; *Taylor v. Plumer*, 3 Maule & Selw. 262; *Cook v. Tullis*, 18 Wall. 332; *Hawkins v. Blake*, 108 U. S. 422). It has been held under the present Act, however, that a right which a vendor had in property sold and delivered to a bankrupt under a conditional-sale contract cannot be asserted by such vendor against the property after it has passed to the trustee if statutory provisions requiring such contract to be filed have not been complied with (*In re Yukon Woolen Co. & Legg* [D. C.], 1 N. B. News, 420). It is the trustee's duty to seize all property in the possession of the bankrupt except such as may be a burden to the estate, which he need not accept (*In re Chambers, Calder and Co.* [D. C.], 98 Fed. Rep. 865; *Turner v. Richardson*, 7 East R. 335; *in re Laurie*, 4 B. R. 32; *Smith v. Gordon*, 6 Law Rep. 313; *Copeland v. Stevens*, 1 Barn. & Ald. 593; *Martin v. Black*, 9 Paige, 641; *Lewis v. Bun. Bosw.*, L. R. 213; *Armory v. Lawrence*, 3 Cliff. 523; *Streeter v. Sumner*, 31 N. H. 542; *Rugley v. Robinson*, 19 Ala. 404; *Traders' N. Bk. v. Campbell*, 14 Wall. 87; s. c. 6 B. R. 353; *Second N. Bk. v. State N. Bk.*, 11 B. R. 49; *McHenry v. La Societe Francaise*, 95 U. S. 58). The title to the property not claimed remains in the bankrupt (*Tuck v. Fyson*, 6 Bing. 321; *Smith v. Gordon*, *supra*). If others claim rights in the property seized, they must assert them in the court of bankruptcy (*In re Vogel*, 7 Blatch. 18; s. c. 3 B. R. 198), where, upon petition and proof of ownership, the property will be restored (*In re Havens*, 8 Ben. 309. See also *Walker v. Reister*, 102 U. S. 467). This is unquestionably on the conclusion that the trustee does not set up claims to the property adverse to those asserting title, but merely compels such persons to

his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.¹

prove their rights. If, after such proof is made, the trustee elects to really question the title of the claimants by denying their ownership, then a controversy between "adverse claimants" would be precipitated and the bankruptcy court, under the present Act, would have no jurisdiction to determine the issue (§23a. See also *Smith v. Mason*, 14 Wall. 419; *Marshall v. Knox*, 16 Wall. 551; *O'Brien v. Weld*, 92 U. S. 81). The persons claiming title to property which the trustee may have seized are not parties to the bankruptcy proceedings (*Marshall v. Knox*, 16 Wall. 551; s. c. 8 B. R. 97; *Smith v. Mason*, 6 B. R. 1; s. c. 14 Wall. 419), but such a petition would undoubtedly make them parties, confer jurisdiction upon the court, subject them to its action and bind them by its decrees (*Samson v. Blake*, 6 B. R. 410; s. c. 9 Blatch. 379; *in re Ulrich*, 3 B. R. 133; s. c. 3 Ben. 355; *in re Worthington*, 14 B. R. 388; *People v. Brennan*, 12 B. R. 567; s. c. 3 Hun. 666; *in re Ferguson & Peckham*, 6 B. R. 569; *O'Brien v. Weld*, 92 U. S. 81; s. c. 15 B. R. 405). The claimants in such petition may have their rights summarily determined (*In re Evans*, 1 Lowell. 525), though not if the trustee objects (*Hurst v. Teft*, 13 B. R. 108; s. c. 12 Blatch. 217; *Bradley v. Healey*, 1 Holmes, 451; *Wood v. Brooke*, 9 B. R. 395). Either party, it seems, is entitled to have an issue framed and submitted to a jury (§19c). The court will not authorize a receiver, who has been appointed pending the selection of a trustee, to bring suit in a foreign jurisdiction to collect assets (*In re Schrom* [D. C.], 97 Fed. Rep. 760), nor will it summarily order property in the hands of persons other than the bankrupt to be delivered to the trustee when such third person claims title thereto (*In re Mayer* [D. C.], 98 Fed. Rep. 839).

¹ This subdivision limits the rights of action which pass to the trustee to those springing from damage actually done to the property (See Parsons on Contracts, Part II, Ch. XII, §IX, citing *Drake v. Beckham*, 11 M. & W. 315). Rights of action for mere personal injury do not pass (*Stone v. Boston & Main R. R.*, 7 Gray, 539), as the right of action for damages for malicious prosecution and arrest (*In re Haensell* [D. C.], 1 N. B. News, 240; s. c. 91 Fed. Rep. 355), assault and battery, slander, seduction and kindred actions (*Rogers v. Spence*, 13 M. & W. 571; *Howard v. Crowther*, 8 M. & W. 601; *Bird v. Hempstead*, 3 Day, 272; *Stanley v. Dukurst*, 2 Root, 52; *Nichols v. Bellows*, 22 Vt. 581; *Benson v. Flower*, Sir W. Jones, 215; *Clark v. Calvert*, 8 Taunt. 742; 3 Moore, 96; *Shoemaker v. Keeley*, 1 Yeates, 245, 2 Dall. 213; *Smith v. Milles*, 1 T. R. 475; *Brandon v. Pate*, 2 H. Bl. 308; *Beckham v. Drak*, 8 M. & W. 846; *Noonan v. Orten*, 12 B. R. 405; *Brewer v. Drew*, 11 M. & W. 625). There are certain other rights of action which partake of both a personal and property nature. As to whether these pass to the trustee, the courts are not agreed. Each must depend upon its own facts. It was held that the right of action for fraudulently recommending a person as worthy of trust and confidence did not vest in the trustee (*In re Crockett*, 2 Ben. 514), though the right of action for loss incurred in a business in which the bankrupt was fraudulently induced to engage did pass to his trustee (*Hyde v. Tufts*, 45 Sup. Ct. [N. Y.], 56). The right to sue for a penalty is another of this class, and whether it passes to the trustee depends upon whether the statute under which the right arises makes it assignable, it not being so in the absence of such a provision (*Wright v. F. N. Bank*, 18 B. R. 87; *Gardner v. Adams*, 12 Wend. 297). So the right to sue for and recover usurious interest is unsettled. Some courts hold that that right passes to the trustee (*Wright v. F. N. Bank*, 18 B. R. 87; *Crocker v. F. N. Bank*, 3 Cent. L. J. 527; *Moore v. Jones*, 23 Vt. 739; *Tiffany v. Boatman's Sav. Inst.*, 18 Wall.

b All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by and report to, the court.¹ Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.²

c The title to property of a bankrupt estate which has been sold as herein provided, shall be conveyed to the purchaser by the trustee.³

d Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.⁴

276; s. c. 1 Dill. 141; *Wheelock v. Lee*, 64 N. Y. 242 and cases cited). The decision in *Wheeler v. Lee* was based upon a common law rather than a statutory right. Other courts hold that such a right does not vest in the trustee (*Brombey v. Smith*, 5 B. R. 152; s. c. 2 Biss. 511; *Nichols v. Bellows*, 22 Vt. 581). The right to sue for money lost in gambling has been held to vest in the trustee under the common law without reference to whether the statute made the same assignable (*Meech v. Stoner*, 19 N. Y. 26; *Carter v. Abbott*, 1 Barn. & Cress. 444; *Gray v. Bennett*, 3 Met. 522). See also notes to §47a(2) as to when rights of action are conveyed by the trustee in the sale of property.

¹See Rule XVII as to the duty of the trustee to prepare a complete inventory of the property, and Form 13 as to the appointment, oath and report of the appraisers. If the appraisers value the entire estate, their inventory is not binding on the trustee as respects exempt property (*In re Grimes* [D. C.], 96 Fed. Rep. 529). Nor should they appraise property which cannot be considered in estimating the estate and which does not come into the trustee's possession, as money which the petitioner claimed to have on his person at the time of filing the petition, or property conveyed by the petitioner without consideration within four months of the filing of the petition (*In re Tudor* [D. C.], 1 N. B. News, 339).

²See Rule XVIII relative to the sale of property. Any property in the hands of the trustee, having liens upon it, may be sold by the order of the court free from incumbrances (*In re Pitteckow* [D. C.], 1 N. B. News, 234; s. c. 92 Fed. Rep. 901). See also §47a(2) as to collecting and reducing the property of the estate to money, together with the notes thereto.

³See notes to §47a(2) as to when rights of action follow the title of the property conveyed by the trustee.

⁴As to the confirmation of compositions, see §12; as to their revocation, §13. For the definition of "discharge", see §1(12); as to when it is granted, §14; and as to its revocation, §15.

e The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value.¹

¹See §60 relative to preferred creditors and §67 as to liens, together with the notes to these sections.

By subdivision *a*(4), the trustee is vested with whatever rights creditors might have as to property transferred in fraud of their rights, and under this paragraph may bring suit in equity for the recovery of such property (*Wall v. Cox* [C. C. A.], 101 Fed. Rep. 403), or take such other steps as were open to creditors under the common law (*In re Mullen* [D. C.], Id., 413). The property, however, for the recovery of which action is brought, must have vested in the trustee. Where a firm was insolvent and one partner transferred his interest to another, the firm property did not so vest when the partner so acquiring it re-conveyed it to a bona fide purchaser for value prior to the adjudication (*In re Rudnick* [D. C.], 102 Fed. Rep. 750). The creditors cannot, themselves, begin any proceeding for the recovery of such property, and must look to the trustee to take such action as may be necessary for that purpose (*Glenney v. Langdon*, 98 U. S. 20; *Moyer v. Dewey*, 103 U. S. 301). The bankrupt is not necessarily a party to a suit in equity brought by the trustee to avoid any transfer or recover any property in accordance with the provisions of this paragraph (*Cox v. Wall et al.* [D. C.], 99 Fed. Rep. 546), though he may be made such (*Norcross v. Nathan et al.* [D. C.], 99 Fed. Rep. 414). An action for the recovery of such property may be instituted after the bankrupt has been discharged (*In re Pierce*, 103 Fed. Rep. 65). A comparison between §67*e*, subdivision *a*(4) of this section, and the present paragraph leads to the conclusion that the right here given to recover property is not limited to such as may have been fraudulently transferred within four months of the filing of the petition, but refers to any so transferred at any time, if the statute of limitation has not barred the right to recover. Being the representative of creditors, estoppels that would defeat the bankrupt will not affect the trustee (*Sawyer v. Hoag*, 17 Wall. 610; *in re Jaycox*, 12 Blatch. 209; *Allen v. Massey*, 17 Wall. 351; *Traders' Bank v. Campbell*, 14 Wall. 87; *Clarion Bank v. Jones*, 21 Wall. 325).

Under the former Act, the question often arose as to whether the trustee, as the representative of creditors, could avoid liens or transfers invalid only as to subsequent purchasers or judgment creditors, especially when the creditors affected had not obtained judgment at the time of the adjudication in bankruptcy and were by that Act thereafter prevented from prosecuting their claims. There were authorities which favored the affirmative of this question on the theory that the trustee, so far as he represented the creditors, was for such purpose a judgment creditor (*Barker v. Smith*, 12 B. R. 474; *Kane v. Rice*, 10 B. R. 469; *in re Duncan*, 14 B. R. 18; *Miller v. Jones*, 15 B. R. 150). Other authorities denied that he stood in such a relation (*Cook v. Waters*, 9 B. R. 155; s. c. 55 N. Y. 150; *in re Collins*, 12 B. R. 379), and held that he could not assert any claim in behalf of general creditors which a bankrupt would be estopped from urging in a contest exclusively between himself and the persons holding such liens or conveyances (*Stewart v. Platt*, [U. S. Supreme Ct.], 101 U. S. 731). It does not seem that this question can

f Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him.

THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.

a This act shall go into full force and effect upon its passage. *Provided, however,* That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.¹

b Proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it.

arise under the present Act, however, since the trustee is subrogated to and may enforce the rights of such creditors, especially where the enforcement inures to the benefit of the general creditors (§676). The law presumes that transfers made in other than the usual course of business are fraudulent, and shifts the burden of proving the transaction to be otherwise upon the person claiming property by virtue of such a tainted transaction (*Rison v. Knapp*, 4 B. R. 349; s. c. 1 Dill. 186; *Walbrun v. Babbitt* [U. S. Supreme Ct.], 16 Wall. 577; s. c. 9 B. R. 1). This presumption may be rebutted, however, by the purchaser showing that before acquiring the lien or property he exercised due diligence in making such inquiries as the facts would require of a prudent person (*Schulenberg v. Kabureck*, 2 Dill. 132).

¹This act was approved July 1. 1898 (89 Fed. Rep. IV), and a petition in involuntary bankruptcy filed Nov. 1, 1898, was held not to be filed prematurely (*Leidigh Carriage Co. v. Stengel* [C. C. A.], 1 N. B. News, 387; s. c. 95 Fed. Rep. 637). See also §31 as to the computation of time, together with the notes thereto.

²It has been said under the present Act that a National Bankruptcy Law merely suspends the operation of State Insolvency Laws in so far as the latter conflict with the former. Such State laws may be enacted, amended or repealed during the existence of the National Bankruptcy Law. Such enactment, amendment or repeal will be valid legislative acts though their operation in some respects be suspended while the bankruptcy law continues in force; and when the National Bankruptcy Law is repealed, the Insolvency Laws of the State become operative (*In re Wright* [D. C.], 1 N. B. News, 428; s. c. 95 Fed. Rep. 807). A quite similar view was taken under the former Act in cases which held that State Insolvency Laws were not affected except in so far as they came in conflict with the National Bankruptcy Law, the question of conflict to be determined in each individual case by a showing on the part of the person objecting to the operation of the State Law that he was an adjudicated bankrupt under the National Law (*Reed v. Taylor*, 32 Iowa, 209; *ex p. Ziegenfuss* [N. C. Sup. Ct.], 1 Ired., 463). These cases do not seem to be in harmony with the weight of authority which holds that the State Law is entirely suspended when the National Law comes into force (*Sturgis v. Crowninshield*, 4 Wheat. 122; *Baldwin v. Hale*, 1 Wall. 223; *Blanchard v. Russell*, 13 Mass. 1; *Ogden v. Saunders*, 12 Wheat. 213; *Betts v. Bagley*, 29 Mass. 572; *in re Reynolds*, 8 R. I. 845; s. c. 9 B. R. 50; *Adams v. Story*, 1 Paine, 79; *in re Damon*,

70 Me. 153; *Van Nostrand v. Barr*, 30 Md. 128; *Griswold v. Platt*, 9 Met. [Mass.], 16; *Perry v. Langley*, 1 B. R. 559; s. c. 5 Low. Rep. 117; *Martin v. Barry*, 37 Cal. 208; s. c. 2 B. R. 629. See also *Shryock v. Bashore*, 13 B. R. 481, for an extended discussion and classification of the cases relative to the extent of the suspension of State Laws). A State Law that merely prescribes a mode by which the trust created by an assignment, recognized by the common law for the benefit of creditors, shall be carried out is not an insolvent law, especially when it does not discharge an insolvent from arrest or imprisonment or prevent his after-acquired property being appropriated to the payment of his debts (*Mayer v. Hellman* [U. S. Supreme Ct.], 91 U. S. 496; *Cook v. Rogers*, 31 Mich. 91; *Von Heim v. Elcus*, 8 Hun. 516). Although such an assignment would be an act of bankruptcy (§3), if bankruptcy proceedings are not commenced within four months, the effect would be the same as though no National Bankruptcy Law was in force. It may be said, in general, that any State Law, by whatever name it may be known, will be suspended by the National Bankruptcy Law if it directly or indirectly provides for distributing the assets of an insolvent, for discharging an insolvent of his legal obligations or effects the same by dissolving an insolvent body corporate so as to distribute its assets. The distribution of an insolvent's estate can be legally undertaken, it would seem, only by the court of bankruptcy (*Platt v. Archer*, 9 Blatch. 559; *in re Independent Ins. Co.*, 6 B. R. 260; *Thornhill v. Bank of La.* 5 B. R. 375).

Rules in Bankruptcy.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.¹

¹The Supreme Court of the United States is expressly empowered by the bankruptcy Act to prescribe all necessary rules, forms and orders as to procedure and for carrying this Act into force and effect, and to amend the same from time to time (§30). Independently of statute, courts have an inherent power to prescribe such rules as may be necessary to give legislative acts force and effect (*Havemeyer v. Ingersoll*, 12 Abb. Pr. N. S. [N. Y.] 301; *Snyder v. Bauchman*, 8 S. & R. [Pa.] 336; *Angel v. Plume*, 73 Ill. 412; *Fullerton v. U. S. Bank*, 1 Peters, 604; *Hill v. Barney*, 18 N. H. 607; *Thompson v. Pershing*, 86 Ind. 303; *Texas Land Co. v. Williams*, 48 Tex. 602. See also 8 Am. & Eng. Ency. Law [2d Ed.], 29). It may be questionable, however, whether this independent power is incident to courts of bankruptcy. A bankruptcy Act differs from all other Acts in that it is circumscribed by the constitutional requirement of uniform operation. Did each court possess the power of formulating rules to give the Act force and effect, the want of uniform operation might be as apparent as the variance of the rules. This fact seems to have been recognized in delegating to the Supreme Court the power to provide such rules. Such delegation of power undoubtedly deprives the District Courts of all authority touching the same, except in so far as relates to vesting referees with jurisdiction in addition to that conferred upon them by the Act.

I.

Docket.¹

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced.² It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid.³ The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

II.

Filing of Papers.⁴

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

This authority does not arise, however, from the inherent power of the court to provide rules, but inferentially from the Act itself (§38a[4]). In any event, the inherent authority of courts to formulate rules must be distinguished from the legislative power to enact laws. Rules can only provide for the execution of laws; they can neither add to nor detract from statutory provisions, or impair rights arising from such provisions or from common law principles (*Atlantic Express Co. v. Wilmington*, 32 Am. St. Rep. 805; *Patterson v. Winn*, 5 Peters, 233; *Gray v. Chicago*, 1 Woolworth, 63; *Ward v. Chamberlin*, 2 Blackf. [U. S.] 437; *Saylor v. Taylor*, 77 Fed. 476; *Fisher v. Bank*, 73 Ill. 34; *Gormerly v. McGlynn*, 84 N. Y. 284; *in re Glaser*, 2 Ben. 180; s. c. 1 B. R. 236; *The Illinois*, 1 Brown, 13).

¹For analogous provisions, see Rule I, 1867.

²Under the present Act, proceedings are deemed to have been commenced when the petition is filed (§1[10]). Under the equity practice, a suit is not pending until the subpoena is returned served and executed (U. S. Eq. Rule XVI).

³The docket shall also contain the name with the place of business of an attorney who appears in behalf of any party (Rule IV), and it must show that the petition was filed in duplicate as required by the statute (*In re Dupree* [D. C.], 99 Fed. Rep. 28). See also §§29(3), 39(7), 42 as to the referee's records, and §§39(6, 8), 49 as to the accounts and papers of the trustee.

⁴For analogous provisions, see Rule I, 1867.

After a case has been referred to the referee, papers therein may be filed with either the clerk or referee (Rule XX).

III.

Process.¹

All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

IV.

Conduct of Proceedings.²

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf,³ or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practice in the circuit or district court.⁴ The name of the attorney or counselor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.⁵

V.

Frame of Petitions.⁶

All petitions and the schedules filed therewith shall be

¹For analogous provisions, see Rule II, 1867. See also §18a and U. S. Eq. Rules VII, XI, XVI as to the service of process.

²For analogous provisions, see Rule III, 1867. Also §64b(3) as to allowance of attorney fee.

³As to who may become bankrupts, see §§4, 5; relative to process, pleadings and adjudications, §18; and as to who may file and dismiss petitions, §59.

⁴Since each U. S. Court has separate rules of its own relative to the admission of attorneys, one must have been admitted to practice in the particular district where the bankruptcy proceedings are pending before he is entitled to appear therein. The admission is generally on motion, though the precise requirements must be sought in the rules of the various districts.

⁵See §58 touching notice to creditors; Rule XXIII as to recitation of notices in referees's orders; and Eq. Rule IV as to notice of motions, rules, orders and other proceedings.

⁶For analogous provisions, see Rule XIV, 1867. See also Form 1 for debtor's petition, Form 2 for partnership petition, and Form 3 for creditor's petition.

printed or written out plainly,¹ without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.²

VI.

Petitions in Different Districts.³

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed.⁴ In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed.⁵ But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.⁶

¹ An illegible petition will not be filed (*Anonymous*, 1 B. R. 215).

² Dots or ditto marks cannot be used for the purpose of indicating anything necessary to be stated (*In re Orne*, 1 Ben. 420; s. c. 1 B. R. 79).

³ For analogous provisions, see Rule XVI, 1867.

⁴ As to the jurisdiction of courts to adjudge persons bankrupt, see §2(1).

⁵ As to the court's jurisdiction over partners, see §5.

⁶ As to the transfer of cases, see §§2(19), 32.

The question of residence of a petitioner may be raised and determined before adjudication by creditors moving to set the petition aside for want of jurisdiction, the residence or domicile of petitioner being in another district (*In re Waxelbaum* [D. C.], 98 Fed. Rep. 589). It is not necessary that one should reside in the

VII.

Priority of Petitions.¹

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

VIII.

Proceedings in Partnership Cases.²

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defences which any debtor proceeded against is entitled to take by the provisions of the act;³ and in case an adju-

district actually, during the greater portion of six months. He may be away from there if such absence does not work an abandonment within the meaning of the common law (*In re Williams* [D. C.], 99 Fed. Rep. 544).

¹For analogous provisions, see Rule XV, 1867.

²For analogous provisions, see Rule XVIII, 1867. See also Form 2 for partnership petition.

³As to Acts of Bankruptcy, see §3; as to proceedings involving partners or partnerships in bankruptcy, §5; as to process, pleadings and adjudications, §18, and U. S. Eq. Rules VII-XVI relative to the issuance and service of process.

dication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.¹

IX.

Schedule in Involuntary Bankruptcy.²

In all cases of involuntary bankruptcy in which the bankrupt is absent or can not be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

X.

Indemnity for Expenses.³

Before incurring any expense in publishing or mailing notices, or in travelling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

¹As to the duty of the bankrupt to file schedules, see §7(8); as to the referee's duty in that behalf, §392(6); and as to that of petitioning creditors, Rule IX.

²There was no analogous rule under former Acts. See also the preceding rule and notes.

³For analogous provisions, see Rule XXIX, 1867. See also Rule XXXV as to compensation of officers; §52 relative to the compensation of clerks and marshals, and §62 as to expenses of administering estates. "All notices shall be given by the referee unless otherwise ordered by the judge" (§58c).

Although the question has not yet arisen, it is safe to say that indemnity cannot be exacted for extra compensation to expert witnesses, for such compensation under §2(18) cannot be taxed as costs (*In re Carolina Cooperage Co.* [D. C.], 96 Fed. Rep. 604).

XI.

Amendments.¹

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

XII.

Duties of Referee.²

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy,³ and may receive from the referee a protection against arrest,⁴ to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred

¹For analogous provisions, see Rule XIV, 1867. See also §59 relative to the filing and dismissal of petitions, and §39a(2) as to the referee's duty to examine all schedules and cause such as are incomplete or defective to be amended. To prevent a dismissal of a petition, the court will allow the same to be amended when necessary (*In re Nelson* [D. C.], 98 Fed. Rep. 76).

²For analogous provisions, see Rules IV, V, 1867. As to the references of cases to the referee, see §§18/ and 8, 22a, and Forms 14 and 15 relative thereto. See also §38 as to the referee's jurisdiction, and §§39 and 55 as to his duties.

³As to the duty of the bankrupt to comply with all lawful orders of the court, see §7(2).

⁴As to the protection of a bankrupt from arrest, and his detention for examination, see §9; and as to his release from imprisonment, Rule XXX. The time during which a bankrupt shall be exempt from arrest is extended by this rule to the whole period of time during which his performance of the duties imposed by the Act may be ordered—that is, until final adjudication on his application for discharge, or until the time limited for such application has expired (*In re Lewensohn* [D. C.], 99 Fed. Rep. 73).

to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.¹

3. Applications for a discharge,² or for the approval of a composition,³ or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

XIII.

Appointment and Removal of Trustee.⁴

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

XIV.

No Official or General Trustee.⁵

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

XV.

Trustee not Appointed in Certain Cases.⁶

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable.⁷ If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

¹See §55 relative to the time and place of creditors' meetings.

²This application is to be heard by the judge (§146).

³See §12d as to when the judge will confirm the composition.

⁴For analogous provisions, see Act of 1867, §§13, 18; R. S §§5034, 5039. Relative to the appointment of trustees, see §§2(17), 44, 45. Also Forms 22, 23 relative thereto.

⁵For analogous provisions, see Rule IX, 1867, as amended in 1874.

⁶This rule is new. See Form 27 relative thereto. Also Rule XIII as to the appointment and removal of trustees.

⁷*In re Smith* [D. C.], 93 Fed. Rep. 791.

XVI.

Notice to Trustee of his Appointment.¹

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.²

XVII.

Duties of Trustee.³

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered

¹For analogous provisions, see Rule IX, 1867. See also Form 24 relative thereto.

²See §50 relative to bonds of the referees and trustees. Also Form 25, Bond of Trustee, and Form 26, Order approving Trustee's Bond.

³For analogous provisions, see Rule XIX, 1867. As to the duties of the trustee, see §§47, 70b; and as to his appointment, Rule XIII.

If there is property of the bankrupt in the hands of a receiver appointed by a State court at the time of adjudication, the trustee, when appointed, should intervene to protect the interests of the general creditors, and to enable him so to do, the bankruptcy court will stay further proceedings in the State court for a reasonable length of time (*In re Klein* [D. C.], 97 Fed. Rep. 31).

to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

XVIII.

Sale of Property.¹

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors,² and the proceeds to be deposited in court.³

XIX.

Accounts of Marshal.⁴

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed

¹For analogous provisions, see Rules XXI, XXII, 1867. See also §704 as to the sale of property by the trustee, and Forms 42, 44, 45, 46 relative thereto.

²The provision in this paragraph that sales may be made without notice to the creditors is in derogation of the statute which declares that creditors shall have at least ten days notice of all proposed sales of property (§587(4)).

³A receiver appointed pending the election and qualification of a trustee may be ordered to sell the bankrupt's property when that course seems necessary (*In re Becker* [D. C.], 98 Fed. Rep. 407).

⁴For analogous provisions, see Rule XII, 1867; as to the marshal's compensation, §526, and Rule X as to his right to demand indemnity. See also §2(3, 5) as to the right of the court to appoint receivers and marshals to take charge of the bankrupt's property and conduct his business. A deputy marshal, appointed to take charge of the bankrupt's property, may hire a competent person for watchman and charge \$1.00 a day for the watchman's services. Such deputy will be allowed as compensation \$2.50 a day with his actual and necessary expenses, but not including the cost of his board and lodging (*In re Scott et al.* [D. C.], 99 Fed. Rep. 404).

to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable,¹ and also with a statement that the amounts charged by him are just and reasonable.

XX.

Papers Filed after Reference.²

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

XXI.

Proof of Debts.³

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.⁴

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and thereafter, and until some other

¹When vouchers are not presented with his report, the marshal should set out therein the reason that makes it impracticable (*In re Comstock*, 9 B. R. 88).

²This is a new rule. As to the filing and keeping of papers and records, see §39^a(7, 8, 10), §42^b, and §51^a(3).

³For analogous provisions, see Rule XXXIV, 1874.

⁴As to the court's jurisdiction to allow or disallow claims, see §2(2); as to proof and allowance of claims, §57; and as to debts which may be proved, §63. See also Forms 31-37 relative to proof of debts.

designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.¹

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings,² setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims.³ Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.⁴

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public.⁵ When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose

¹See §58 as to the notices to which creditors are entitled.

²"Commencement of proceedings" means the date when the petition was filed (§1[10]).

³As to set-offs and counter-claims, see §58.

⁴As to proof and allowance of claims, see §57, and especially §57*i* as to when a surety for the bankrupt may prove a claim if the principal creditor fails or neglects so to do.

⁵As to the persons before whom oaths required by the Act may be taken, see §20.

Rule XXXIV, 1874, the one analogous to that under consideration, provided that the power of attorney might be acknowledged before a Register in bankruptcy or a U. S. Circuit Court Commissioner. It did not provide that the same might be acknowledged before a notary public. In construing that rule, it was held in one case that the oath or acknowledgment might be taken before others than those mentioned (*In re Butterfield*, 14 B. R. 195), and in another that it might not be so taken (*In re Christley*, 10 B. R. 268).

behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.¹

XXII.

Taking of Testimony.²

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.³

¹The provisions of this paragraph apply to claims against the bankrupt at the time the petition was filed as distinguished from claims against the estate for expenses of administration (*In re Reliance Storage & Warehouse Co.* [D. C.], 100 Fed. Rep. 619). The party seeking the re-examination has the burden of proof as to the facts set out in his petition (*Canby v. McLearn*, 13 B. R. 22; *in re Howard* [D. C.], 100 Fed. Rep. 630. See also §574 and notes thereto). He may examine the creditor in whose favor the allowance has been made (*In re Robinson*, 14 B. R. 130), and if such creditor fails to appear when ordered, the court should vacate the allowance and expunge his proof of claim (*In re Lount*, 11 B. R. 315).

See also Forms 38 and 39 relating to re-examination of claims.

²For analogous provisions, see Rule X, 1867. As to evidence in bankruptcy proceedings, see §21, and as to the jurisdiction of referees, §38.

³See §2(18) relative to the taxation of costs; and §64b(3) as to witness and attorney fees allowed and given priority as expenses of administering the estate.

XXIII.

Orders of Referee.¹

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

XXIV.

Transmission of Proved Claims to Clerk.²

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

XXV.

Special Meeting of Creditors.³

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

XXVI.

Accounts of Referee.⁴

Every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

¹For analogous provisions, see Rule VIII, 1867.

²For analogous provisions, see Rule XI, 1867.

³This rule is new. As to appointment of trustees, see §44; and as to meetings of creditors, §55.

⁴For analogous provisions, see Rule XII, 1867. See Rule X, *ante*, as to the right of the referee to demand indemnity for expenses; Rule XXXV(2) as to the allowance of expenses by the judge; and §40 as to compensation to be received by him.

XXVII.

Review by Judge.¹

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto,² and the finding and order of the referee thereon.

XXVIII.

Redemption of Property and Compounding of Claims.³

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

¹For analogous provisions, see Rule VIII, 1874. See also §38a which provides that all actions of the referee are subject to review by the judge. That section or this rule does not authorize a general review of the proceedings before the referee, or of rulings not directly affecting an order. Specific questions arising in proceedings are to be presented on certificate of the referee, or, in case of orders entered, on petition for review [*In re Kelly Dry-Goods Co.* [D. C.], 102 Fed. Rep. 747]. In applying for the review, the rule must be complied with as it is mandatory, and no exception will be considered which is not in accordance therewith [*In re Scott et al.* [D. C.], 99 Fed. Rep. 404].

²This provision relating to a "summary of the evidence" must be construed in connection with §39(5), which unquestionably provides that the referee's report shall embody all the evidence unless the substance of it can be agreed upon between the parties.

See Form 56 for referee's certificate to the judge on proceedings certified for review.

³For analogous provisions, see Rule XVII, 1867. See also §2(7) as to the jurisdiction of the bankruptcy court to cause estates to be collected, reduced to money and distributed; §27 relative to compromises; Rule XXXIII as to arbitration; §67 as to liens; and Form 43 for petition and order for redemption of property from liens.

XXIX.

Payment of Moneys Deposited.¹

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

XXX.

Imprisoned Debtor.²

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged;³ if not, he shall be remanded to

¹For analogous provisions, see Rule XXVII, 1867. See also §47a(3, 4) as to the trustee's duty in depositing and disbursing moneys, and §61 as to depositories for money.

²For analogous provisions, see Rule XXVII, 1867. See also Rule 12(1) as to the power of the referee to protect bankrupts from arrest.

³See §9 as to protection and detention of bankrupts. The first paragraph of that section, subdivision two, provides that a bankrupt shall not be exempt from arrest upon civil process when issued from a State court upon a debt or claim

the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

XXXI.

Petition for Discharge.¹

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

from which the bankrupt would not be released by a discharge in bankruptcy. This rule provides that the bankrupt may be released from imprisonment if arrested upon a claim provable in bankruptcy. Such claims or debts are fixed liabilities, as court costs, open accounts or claims arising from express or implied contracts, provable debts reduced to judgment after the filing of the petition, and claims liquidated under direction of the court (§63). If any of the debts so provable be a tax levied by the United States, the State county, district, or municipality in which the bankrupt resides—if it be a judgment in an action for fraud, obtaining property by false representations, or for wilful and malicious injuries to the person or property of another—if it be a debt not duly scheduled which the creditor had no opportunity to prove—or if it be a debt created by fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in a fiduciary capacity, the discharge in bankruptcy will not release the bankrupt therefrom (§17). As to these debts from which the bankrupt will not be released by a discharge he may be arrested on civil process, and the court has no jurisdiction, in view of §9, to discharge him from such arrest or imprisonment. The provisions in the rule under consideration, so far as they relate to the discharge from an arrest or imprisonment founded on a debt from which he would not be released by a discharge, are not within the power conferred upon the Supreme court by §30. They are not "necessary rules" for carrying the Act into effect, but new legislative provisions, beyond the power of the judicial branch of the government to bring into being, and are mere nullities (*In re Robinson*, 6 Blatch. 253; s. c. 36 How Pr. 176; *in re Ghser*, 1 B. R. 336; s. c. 2 Ben. 180; *in re Patterson*, 2 Ben. 155; s. c. 1 B. R. 307; *in re Boyst*, 2 B. R. 171; *in re Kimball*, 6 Blatch. 292; s. c. 2 Ben. 554; s. c. 2 B. R. 204; *in re Whitehouse*, 1 Lowell. 429; s. c. 4 B. R. 63; *in re G. W. Kimball*, 2 Ben. 38; s. c. 1 B. R. 193; *in re Migel*, 2 B. R. 481; *in re Seymour*, 1 Ben. 348; s. c. 1 B. R. 29; *in re Williams*, 6 Biss. 233; s. c. 11 B. R. 145). Although this rule, therefore, attempts to authorize the bankrupt's release if the claim is one provable in bankruptcy, it must yield to the more restricted provisions of §9 in so far as it conflicts therewith (*In re Baker* [D. C.], 96 Fed. Rep. 954).

¹ This rule is new. See §14 as to when discharges are granted, and Form 57 for the petition to be filed in applying therefor.

The referee should take such steps as the statute requires on applications for discharges referred to him (*Mahoney et al. v. Ward* [D. C.], 100 Fed. Rep. 278). His authority is not limited simply to taking and reporting evidence that may be adduced, but he should also report findings and recommendations (*In re Kaiser* [D. C.], 99 Fed. Rep. 689).

XXXII.

Opposition to Discharge or Composition.¹

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance² in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.³

XXXIII.

Arbitration.⁴

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

XXXIV.

Costs in Contested Adjudications.⁵

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the

¹For analogous provisions, see Rule XXIV, 1867. See Form 58. Also §126 and §146 relative to the hearing of specifications in opposition to confirmation or discharge, and §58a(2) relative to the notice to which creditors are entitled.

²The appearance may be in person or by attorney (Rule IV).

³Under this Rule, where appearances are entered to oppose a discharge, but specifications are not filed within ten days, it is discretionary with the court to permit them to be thereafter filed (*In re Price* [D. C.], 96 Fed. Rep. 611; s. c. 1 N. B. News, 432).

A specification in opposition to a bankrupt's application for a discharge on the ground of having concealed property from his trustee is fatally defective if it fails to allege that the offense was committed "knowingly and fraudulently", or to charge any of the essential facts necessary to show the commission of the offense, though these need not be pleaded with the technical certainty required in an indictment (*In re Kaiser* [D. C.], 99 Fed. Rep. 689).

⁴For analogous provisions, see Rule XX, 1867. As to arbitration of controversies, see §26; as to compromises, §27; as to redemption of property and compounding claims, Rule XXVIII; and as to the notice to which creditors are entitled, §58.

⁵For analogous provisions, see Rule XXXI, 1867. As to the jurisdiction of bankruptcy courts to tax costs and render judgments therefor, see §2(18); as to

debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

XXXV.

Compensation of Clerks, Referees and Trustees.¹

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.²

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.³

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.⁴

4. In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or

costs against creditor on seizing debtor's property, when petition is dismissed, §3c; as to attorney fee taxable as part of costs of administration, §64b(3).

This rule is evidently intended to govern the allowance of costs in ordinary involuntary proceedings. The allowance of counsel fees in addition to costs can only be allowed by express statutory provisions, and are not warranted by this rule (*in re Ghiglione* [D. C.], 1 N. B. News, 351; s. c. 93 Fed. Rep. 186).

¹This rule is new. As to the right of officers to demand indemnity, see Rule X.

²As to the compensation of clerks, see §52a. Also §51a(2) as to the clerk's duty to collect official fees.

³As to the compensation of referees, see §40.

⁴As to the compensation of trustees, see §48.

may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.¹

XXXVI.

Appeals.²

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a Territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the

¹By the provisions of §51a(2), a voluntary bankrupt is excused from paying the filing fees when his petition is accompanied by an affidavit stating that he is without and cannot obtain the money with which to pay such fees. That provision cannot be rendered null by a rule of the Supreme court, as is attempted by the present paragraph. The Supreme court has no power to prescribe a rule in conflict with statutory provisions, and when such a rule is promulgated, it has no force in so far as it conflicts, and must give way to the statutory provision. Following that principle of statutory construction, it has been held, in construing the present paragraph, that a voluntary bankrupt, where the petition is accompanied by the prescribed affidavit, cannot subsequently be required to pay such filing fees out of exempt property or money earned after filing the petition. Neither is he required to borrow money for that purpose, nor will he be guilty of a false oath in making an affidavit that he cannot obtain the requisite sum, although it appears that friends would have advanced him the amount if requested (*Sellers v. Bell* [C. C. A.], 94 Fed. Rep. 801).

§40 and this rule recognize no other compensation to the referee where there are no assets than the preliminary fee deposited with the clerk (*In re Langslow et al.* [D. C.], 98 Fed. Rep. 869). A temporary receiver is entitled to such compensation as the court deems proper (*In re Scott et al.* [D. C.], 99 Fed. Rep. 404).

²This rule is new, though it has some analogous features in Rule XXVI, 1867.

As to the jurisdiction of appellate courts, see §24; and as to appeals and writs of error, §25.

facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

XXXVII.

General Provisions.¹

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

XXXVIII.

Forms.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

¹For analogous provisions, see Rule XXXII, 1867.

Forms in Bankruptcy.

[N. B.—Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken. Bankrupt Act of 1898, c. 4, §20.]

[FORM No. 1.]

Debtor's Petition.¹

To the Honorable _____,
Judge of the District Court of the United States
for the _____ District of _____:
The petition of _____, of _____, in the county of _____, and district and State of _____, [state occupation], respectfully represents:

That he has had his principal place of business [or has resided, or has had his domicile] for the greater portion of six months next immediately preceding the filing of this petition at _____, within said judicial district;² that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts.³

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts. _____.

_____, Attorney.

¹As to who may become bankrupts, see §4; as to who may file and dismiss petitions, §59; as to the Frame of Petitions, Rule V; as to making the adjudication or dismissing the petition, §18g; and as to petitions filed against the same individual in different districts, Rule VI.

²As to the residence or domicile of petitioner within the district, see §2(1).

³As to the bankrupt's duty to file schedules, see §7(8).

United States of America, District of ———, ss:

I, ———, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

———, *Petitioner.*

Subscribed and sworn to before me this — day of ———,
A. D. 19—.

———, ———,
———
(*Official character*).

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT.¹

Schedule A. (1)

Statement of all creditors who are to be paid in full, or to whom priority² is secured by law.

Claims which have priority.	Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	Where and when contracted.	Nature and consideration of the debt, and whether contracted as partner or joint contractor; and if so, with whom.	Amount.
(1.)						\$ c.
Taxes and debts due and owing to the United States.						
(2.)						
Taxes due and owing to the State of —, or to any county, district, or municipality thereof.						
(3.)						
Wages due workmen, clerks, or servants, to an amount not exceeding \$300 each earned within three months before filing the petition.						
(4.)						
Other debts having priority by law.						
Total.....						

_____, *Petitioner.*

¹ As to bankrupt's duty to file schedules, see §72(8); as to referee's, §39a(6); as to creditor's, in involuntary cases, Rule IX. See also §39a(2) as to the referee's duty to examine and when defective cause schedules to be amended. As to abbreviations and interlineations, see Rule V.

² As to debts which have priority, see §64.

Schedule A. (3)¹

Schedule A (5)¹

Accommodation paper.

[N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences (if unknown, that fact must be stated).	Names and residence of persons accommodated.	Place where contracted.	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.
						\$
						c.
					Total	

_____, *Petitioner.*

Oath to Schedule A.

United States of America, District of _____ ss:

On this _____ day of _____, A. D. 19____, before me personally came _____, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this _____ day of _____, A. D. 19____.

[Official character.]

¹See references to Schedule A(1).

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT.¹

Schedule B. (1)

Real estate.

Location and description of all real estate owned by debtor, or held by him.	Incumbrances thereon, if any, and dates thereof.	Statement of particulars relating thereto.	Estimated value.
			<div>\$</div> <div>c</div>
		Total.....	

_____, *Petitioner.*

¹See references to Schedule A(2).

Schedule B. (2).¹

*Personal property.*²

	\$	c.
a.—Cash on hand.....		
b.—Bills of exchange, promissory notes, or securities of any description (each to be set out separately).....		
c.—Stock in trade, in — business of —, at —, of the value of —.....		
d.—Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz.....		
e.—Books, prints, and pictures, viz.....		
f.—Horses, cows, sheep, and other animals (with number of each) viz.....		
g.—Carriages and other vehicles, viz.....		
h.—Farming stock and implements of husbandry, viz.....		
i.—Shipping, and shares in vessels, viz.....		
k.—Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.....		
l.—Patents, copyrights, and trade-marks, viz.....		
m.—Goods or personal property of any other description, with the place where each is situated, viz.....		
Total.....		

_____, *Petitioner.*

¹See references to Schedule A(1).

²As to the title to property, see §70.

Schedule B. (3)¹*Choses in action.²*

	Dollars.	Cents.
a.— Debts due petitioner on open account.....		
b.— Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds.....		
c.— Policies of insurance.....		
d.— Unliquidated claims of every nature, with their estimated value.....		
e.— Deposits of money in banking institutions and elsewhere.....		
Total.....		

_____, *Petitioner.*¹See references to Schedule A(1).²As to the title to property, see §70.

Schedule B. (4)¹

Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge ²

(N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed or assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.)

General Interest.	Particular description.	Supposed value of my interest.	
Interest in land.....		\$	c.
Personal property.....			
Property in money, stock, shares, bonds, annuities, etc.			
Rights and powers, legacies and bequests.....			
	Total.....		
<i>Property heretofore conveyed for benefit of creditors.</i>		Amount realized from proceeds of property conveyed.	
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor.		\$	c.
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.....			
	Total.....		

_____, *Petitioner.*

¹See references to Schedule A(1).

²As to the title to property, see §70. See also §60 as to preferred creditors, and §3 as to acts of bankruptcy

Schedule B. (5)¹

A particular statement of the property claimed as exempted² from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.

	Valuation	
	\$	c.
Military uniform, arms, and equipments.....		
Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption.....		
Total.....		

_____, Petitioner.

¹See references to Schedule A(1).

²As to exempt property, see §6.

Schedule B. (6)¹

**BOOKS, PAPERS, DEEDS, AND WRITINGS RELATING TO BANKRUPT'S
BUSINESS AND ESTATE.²**

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage, and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.

Deeds.

Papers.

_____, *Petitioner.*

Oath to Schedule B.

United States of America, District of _____, ss:

On this _____ day of _____, A. D., 19____, before me personally came _____, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

[Official character.]

¹See references to Schedule A(1).

²As to the title to property, see §70.

Summary of Debts and Assets.

(From the statements of the bankrupt in Schedules A and B)

Schedule A.....	1 (1) Taxes and debts due United States.....			
" ".....	1 (2) Taxes due States, counties, districts and municipal- ities.....			
" ".....	1 (3) Wages.....			
" ".....	1 (4) Other debts preferred by law.....			
Schedule A.....	2 Secured claims.....			
Schedule A.....	3 Unsecured claims.....			
Schedule A.....	4 Notes and bills which ought to be paid by other parties thereto.....			
Schedule A.....	5 Accommodation paper.....			
	Schedule A, total.....			
Schedule B.....	1 Real estate.....			
Schedule B.....	2-a Cash on hand.....			
" ".....	2-b Bills, promissory notes, and securities.....			
" ".....	2-c Stock in trade.....			
" ".....	2-d Household goods, &c.....			
" ".....	2-e Books, prints and pictures.....			
" ".....	2-f Horses, cows and other animals.....			
" ".....	2-g Carriages and other vehicles.....			
" ".....	2-h Farming stock and implements.....			
" ".....	2-i Shipping and shares in vessels.....			
" ".....	2-k Machinery, tools, etc.....			
" ".....	2-l Patents, copyrights, and trade-marks.....			
" ".....	2-m Other personal property.....			
Schedule B.....	3-a Debts due on open accounts.....			
" ".....	3-b Stocks, negotiable bonds, &c.....			
" ".....	3-c Policies of insurance.....			
" ".....	3-d Unliquidated claims.....			
" ".....	3-e Deposits of money in banks and elsewhere.....			
Schedule B.....	4 Property in reversion, remainder, trust, &c.....			
Schedule B.....	5 Property claimed to be excepted.....			
Schedule B.....	6 Books, deeds, and papers.....			
	Schedule B, total.....			

[FORM No. 2.]

Partnership Petition.¹

To the Honorable _____,

Judge of the District Court of the United States

for the _____ District of _____:

The petition of _____ respectfully represents:

That your petitioners and _____ have been partners under the firm name of _____, having their principal place of business at _____, in the county of _____, and district and State of _____, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

¹As to the bankruptcy of partners, see §5; as to priority of petitions, Rule VII; as to proceedings in partnership cases, Rule VIII; and as to involuntary petitions filed in different districts, Rule VI. See also §2(1) as to the question of residence or domicile and court's jurisdiction to adjudicate in bankruptcy.

That the schedule¹ hereto annexed, marked A, and verified by ——— oath, contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by ——— oath, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

¹As to the bankrupt's duty to file schedules, see §7(8).

And said _____ further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and as, far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts, and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

_____,
_____,
_____.

Petitioners.

_____, *Attorney.*

_____, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

_____,
_____,
_____.

Petitioners.

Subscribed and sworn to before me this _____ day of _____,
A. D. 19—.

_____,
[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[FORM No. 3.]

Creditors' Petition.¹

To the Honorable ———, judge of the District Court of the United States for the ——— district of ———:

The petition of ———, of ———, and ———, of ———, and ———, of ———, respectfully shows:

That ———, of ———, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business, [*or resided, or had his domicile*]² at ———, in the county of ——— and State and district aforesaid, and owes debts to the amount of \$1,000.³

That your petitioners are creditors of said ——— having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of \$500.⁴ That the nature and amount of your petitioners' claims are as follows:⁵

¹As to who may become bankrupts, see §4; as to who may file petitions, §59; as to petitions in different districts, Rule VI; as to priority of petitions, Rule VII; as to the duty of creditors to file schedules, Rule IX; as to frame of petition and abbreviations and interlineations, Rule V; and as to amendments, §39a(2), Rule XI.

It has been held, where there was a district Rule to that effect, that petitions in bankruptcy would not be placed on file unless made out on prescribed printed forms, the written or typewritten ones to be returned to the parties without action (*Mahoney et al. v. Ward* [D. C., E. D. N. Carolina], 100 Fed. Rep. 278).

Where one copy of a petition is filed within four months of the commission of the act of bankruptcy, a failure to file the duplicate copy specified in §59c within the four months is fatal (*In re Stevenson* [D. C.], 1 N. B. News, 313; s. c. 94 Fed. Rep. 110).

The form of the creditor's petition here given outlines the essential requisites to be alleged, and it has been held that allegations charging voidable preferences, or a prayer for the seizure of property in the possession of adverse claimants, or for an injunction forbidding attaching creditors, or a receiver appointed by a State court, disposing of property in their hands should be excluded as multifarious (*Mather v. Coe* [D. C.], 92 Fed. Rep. 333; *in re Ogles, ex p. Troutwine* [D. C.], 93 Fed. Rep. 426; s. c. 1 N. B. News, 326).

All the allegations in the petition should be set forth in such a definite and specific manner as to enable the debtor to know what charges he is to meet (*In re Randall & Southerland, Deady*, 557; s. c. 3 B. R. 18).

If a creditor, answering an involuntary petition, alleges that the defendant is not insolvent, the allegations of the answer must be taken as true if the case is submitted upon pleadings (*In re Taylor* [C. C. A.], 102 Fed. Rep. 728).

²As to residence or domicile, see §2(1).

³As to the amount of debts which the involuntary bankrupt must owe, see §4b.

⁴As to the number of creditors and the aggregate amount of their claims necessary in an involuntary petition, see §59b.

⁵The description of the petitioners' claims should show them to be provable (*In re Hadley*, 12 B. R. 366).

And your petitioners further represent that said — is insolvent, and that within four months next preceding the date of this petition, the said — committed an act of bankruptcy,¹ in that he did heretofore, to wit, on the — day of

Wherefore your petitioners pray that service of this petition, with a subpoena,² may be made upon —, as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

—, Attorney.

—, Petitioners.

United States of America, District of —, ss:

—, —, —, —, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.³

Before me, —, this — day of —, 19—.

[Official character.]

[Schedules to be annexed corresponding with schedules under Form. No. 1.]⁴

¹As to insolvency and acts of bankruptcy, see §3.

²As to the issuance and return of the subpoena, see §18a and notes thereto.

³The form of this oath as well as that of the allegations of the petition, carries the impression that the petition must be upon personal knowledge. Such a conclusion should not be drawn until the courts have so decided. The petition should be upon personal knowledge so far as possible, but to require more would be to almost entirely nullify the Act. Under the former Act it was held that the allegations might be upon information and belief, especially when the grounds of belief and the sources of information were given (*In re Muller & Bretano*, 3 B. R. 329; *in re Scammon*, 10 B. R. 66; s. c. 6 Biss. 130; *in re Scull*, 7 Ben. 371; *Orem v. Harley*, 3 B. R. 263). It should also be remembered that the Forms are to be varied as may be necessary to suit the circumstances in any particular case (Rule XXXVIII).

⁴The schedules here referred to may be annexed to the petition when it is filed; but the petition and schedules may be filed separately, the latter within five days after the date of adjudication (Rule IX).

[FORM No. 4.]

Order to show Cause upon Creditors' Petition¹

In the District Court of the United States for the — District of —.

In the matter of	}	In Bankruptcy.

Upon consideration of the petition of — that — be declared a bankrupt, it is ordered that the said — do appear at this court, as a court of bankruptcy, to be holden at —, in the district aforesaid, on the — day of —, at — o'clock in the — noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpoena, be served on said —, by delivering the same to him personally, or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the Honorable —, judge of the said court, and the seal thereof, at —, in said district, on the — day of —, A. D. 19—.

{ Seal of
the court. }

_____,
Clerk.

¹As to the issuance of subpoena and service of process, see §18a, Rules III, XXXVII, and Equity Rules XIII-XVI. See also §39a(2, 6) and Rule IX relative to the filing of schedules.

[FORM No. 5.]

Subpoena to Alleged Bankrupt.¹

United States of America, — District of —.

To —, in said district, greeting:

For certain causes offered before the District Court of the United States of America within and for the — district of —, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at —, in said district, on the — day of —, A. D. 19—, — to answer to a petition filed by — in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said district court shall consider in this behalf. An this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable —, judge of said court, and the seal thereof, at —, this — day of —, A. D. 19—.

{ Seal of the {
 { court. {

—, Clerk.

¹See §18a and notes thereto, together with Rules III, XXXVII, and Equity Rules XIII-XVI relative to the issuance of, service of and seal on process.

[FORM No. 6.]

Denial of Bankruptcy¹

In the District Court of the United States for the ———
 District of ———.

In the matter of

} In Bankruptcy.

At ———, in said district, on the — day of ———, A. D. 19—.

And now the said ——— appears, and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court [*or*, he demands that the same may be inquired of by a jury].²

Subscribed and sworn to before me this ——— day of ———, A. D. 19—.

 [*Official character.*]

¹As to acts of bankruptcy, see §3.

²As to trials by jury, see §19.

[FORM No. 7.]

Order for Jury Trial.¹

In the District Court of the United States for the _____
District of _____.

In the matter of

In Bankruptcy.

At _____, in said district, on the _____ day of _____, 19____.

Upon the demand in writing filed by _____, alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency may be inquired of by a jury, it is ordered, that said issue be submitted to a jury.

{ Seal of
the Court. }

_____,
Clerk.

¹As to jury trials, see §19. See also Rule III as to seal of court on process.

[FORM No. 8.]

Special Warrant to Marshal.¹

In the District Court of the United States for the——
District of——.

In the matter of	}	In Bankruptcy.

To the marshal of said district or to either of his deputies,
greeting :

Whereas a petition for adjudication of bankruptcy was, on the
—— day of ——, A. D. 19——, filed against——, of the
county of —— and State of ——, in said district, and said
petition is still pending; and whereas it satisfactorily appears
that said —— has committed an act of bankruptcy [*or* has
neglected *or* is neglecting, *or* is about to so neglect his property
that it has thereby deteriorated *or* is thereby deteriorating *or* is
about thereby to deteriorate in value], you are therefore autho-
rized and required to seize and take possession of all the estate,
real and personal, of said ——, and of all his deeds,
books of account, and papers, and to hold and keep the same
safely subject to the further order of the court.

Witness the Honorable ——, judge of the said court,
and the seal thereof, at ——, in said district, on the —— of
——, A. D. 19——.

{ Seal of
the Court. }

_____,
Clerk.

¹As to the authority of the court to appoint marshals and authorize them to conduct the bankrupt's business, see §2(3, 5); as to the seizure of bankrupt's property prior to adjudication, §§3e, 6g. See also §18a, Rule III, and Equity Rule XV as to the issuance and service of process; Rule X as to the marshal's authority to demand indemnity for expenses; Rule XIX as to the return under oath of his actual and necessary expenses; and §52b as to his compensation.

Return by Marshal Thereon.

By virtue of the within warrant, I have taken possession of the estate of the within-named _____, and of all his deeds, books of account, and papers which have come to my knowledge.

_____,
Marshal [or Deputy Marshal.]

Fees and expenses.

1. Service of warrant		
2. Necessary travel, at the rate of six cents a mile each way		
3. Actual expenses in custody of property and other services as follows		
[Here state the particulars.]		

_____,
Marshal [or Deputy Marshal.]

District of _____, A. D. 19—.

Personally appeared before me the said _____, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

_____,
*Referee in Bankruptcy.*¹

¹This oath may be taken not only before the referee, but before any of the persons specified in §20, which see.

[FORM No. 9.]

Bond of Petitioning Creditor.¹

Know all men by these presents: That we, ———, as principal, and ———, as sureties, are held and firmly bound unto ———, in the full and just sum of ——— dollars, to be paid to the said ———, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ———, A. D. 19—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the ——— district of ——— against the said ———, and the said ——— has applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said ———, subject to the further orders of said district court.

Now, therefore, if such a warrant shall issue for the seizure of said property, and if the said ——— shall indemnify the said ——— for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in
presence of

—————
—————

————— [SEAL.]

————— [SEAL.]

————— [SEAL.]

Approved this ——— day of ———, A. D., 19—.

—————
District Judge.

¹As to the bond to be given by creditors applying for a seizure of bankrupts' property prior to adjudication and because of its deteriorating, see §§3^c and 69.

[Form No. 10.]

Bond to Marshal.¹

Know all men by these presents: That we, ———, as principal, and ———, as sureties, are held and firmly bound unto ———, marshal of the United States for the ——— district of ———, in the full and just sum of ——— dollars, to be paid to the said ———, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ———, A. D. 19—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the ——— district of ———, against the said ———, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said ———, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said district court upon a petition of said ——— has ordered the said property to be released to him.

Now, therefore, if the said property shall be released accordingly to the said ———, and the said ———, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the
presence of

—————
—————

————— [SEAL.]
————— [SEAL.]
————— [SEAL.]

Approved this ——— day of ———, A. D. 19—.

—————,
District Judge.

¹As to the release of a seizure of the bankrupt's property prior to adjudication, see §69 relative to the bond required to be given by him.

[FORM No. 11.]

Adjudication that Debtor is not Bankrupt.¹

In the District Court of the United States for the——
District of——.

In the matter of

In Bankruptcy.

At ——, in said district, on —— day of ——, A. D. 19—, before the Honorable ——, judge of the —— district of ——.

This cause came on to be heard at——, in said court, upon the petition of —— that —— be adjudged a bankrupt within the true intent and meaning of the acts of congress relating to bankruptcy, and [*Here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had.*]

And thereupon, and upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any*], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said —— was not a bankrupt, and that said petition be dismissed, with costs.

Witness the Honorable——, judge of said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 19—.

{ Seal of
the court. }

_____,
Clerk.

¹As to acts of bankruptcy, see §3; as to who may become bankrupts, §4; as to adjudications in bankruptcy, §§2(1), 18; as to who may file and dismiss petitions, §59. See also §32 as to transfer of cases; Rule VI as to petitions in different districts; Rule VII as to priority of petitions; and Rule XXXIV as to costs in contested adjudications.

[FORM No. 12.]

Adjudication of Bankruptcy¹

In the District Court of the United States for the——
District of——.

 In the matter of

Bankrupt .

} In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 19—, before the Honorable ——, judge of said court in bankruptcy, the petition of —— that —— be adjudged a bankrupt, within the true intent and meaning of the acts of congress relating to bankruptcy, having been heard and duly considered, the said —— is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable ——, judge of said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 19—.

{ Seal of
the court. }

_____,
Clerk.

¹As to acts of bankruptcy, see §3; as to who may become bankrupts, §4; as to adjudications, §§2(1), 18. See also §59 as to who may file and dismiss petitions; §32 as to transfer of causes; Rule VI as to petitions in different districts; Rule VII as to priority of petitions; and Rule XXXIV as to costs in contested adjudications.

[FORM No. 13.]

Appointment, Oath, and Report of Appraisers.¹

In the District Court of the United States for the——
District of——.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

It is ordered that ——— of ———, ——— of ———, and ———, of ———, three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this ——— day of ———, A. D. 19—.

_____,
Referee in Bankruptcy.

——— District of ———, ss:

Personally appeared the within-named ——— and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment:

_____.
_____.
_____.

Subscribed and sworn to before me this ——— day of ———
A. D. 19—.

_____,
[Official character.]

¹As to the appointment of appraisers, see §706; and as to oaths or affirmations, §20.

[FORM No. 14.]

Order of Reference¹

In the District Court of the United States for the———
District of———.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

Whereas ———, of ———, in the county of——— and district aforesaid, on the ——— day of ———, A. D. 19—, was duly adjudged a bankrupt upon a petition filed in this court by [or, against] him on the——— day of———, A. D. 19—, according to the provisions of the acts of Congress relating to bankruptcy.

It is thereupon ordered, that said matter be referred to ———, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said ——— shall attend before said referee on the ——— day of ——— at———, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said ——— bankruptcy.

Witness the Honorable ———, judge of the said court, and the seal thereof, at ——— in said district, on the ——— day of ———, A. D. 19—.

{ Seal of
the court. }

_____,
Clerk.

¹As to the references of cases after adjudication, see §22 and Rule XII. See also the next Form as to the order of reference made in the judge's absence.

[FORM No. 15.]

Order of Reference in Judge's Absence.¹

In the District Court of the United States for the _____
 District of _____.

 In the matter of

} In Bankruptcy.
 }

Whereas on the _____ day of _____, A. D. 19—, a petition was filed to have _____, of _____, in the county of _____ and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy*, on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said matter be referred to _____, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said _____ shall attend before said referee on the _____ day of _____, A. D. 19—, at _____.

Witness my hand and the seal of the said court, at _____, in said district, on the _____ day of _____, A. D. 19—.

{ Seal of
 the court. }

_____,
Clerk.

¹As to references made in the judge's absence, see §18/g. See also §22 and Rule XII as to references made by the judge after adjudication.

[FORM No. 16.]

Referee's Oath of Office.¹

I, _____, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

Subscribed and sworn to before me this _____ day of _____,
A. D. 19—.

_____,
District Judge.

¹As to oaths of office of referees, see §36.

[FORM No. 17.]

Bond of Referee.¹

Know all men by these presents: That we _____ of _____ as principal, and _____ of _____ and _____ of _____, as sureties are held and firmly bound to the United States of America in the sum of _____ dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this _____ day of _____, A. D. 19—.

The condition of this obligation is such that whereas the said _____, has been on the _____ day of _____, A. D. 19—, appointed by the Honorable _____, judge of the district court of the United States for the _____ district of _____, a referee in bankruptcy, in and for the county of _____, in said district, under the acts of Congress relating to bankruptcy.

Now, therefore, if the said _____ shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed
in the presence of

_____, [L. S.]
_____, [L. S.]
_____, [L. S.]

Approved this _____ day of _____ A. D. 19—.

District Judge.

¹As to bonds of referees and trustees, see §50.

[FORM No. 18.]

Notice of First Meeting of Creditors.¹

In the District Court of the United States for the——
District of——. In Bankruptcy.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

To the creditors of ——, of ——, in the county of ——, and district aforesaid, a bankrupt.

Notice is hereby given that on the —— day of —— A. D. 19—, the said —— was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at —— in ——, on the —— day of ——, A. D. 19—, at —— o'clock in the —— noon, at which time the said creditors may attend, prove their claims,² appoint a trustee,³ examine the bankrupt,⁴ and transact such other business as may properly come before said meeting.

_____,
Referee in Bankruptcy.

_____, 19—.

¹As to meetings of creditors, see §55; and as to notices to creditors, see §58 and Rule XXI(2).

²As to proof and allowance of claims, see §§55^b, 57.

³As to the appointment of trustees, see §§2(17), 44 and Rule XIII.

⁴As to examination of bankrupts, see §7a(1, 9).

[FORM NO. 19.]

List of Debts Proved at First Meeting.¹

In the District Court of the United States for the——
District of——.

In the matter of	} In Bankruptcy.
<i>Bankrupt</i> .	

At ——, in said district, on the —— day of ——, A. D. 19——, before ——, referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of Creditors.	Residence.	Debts proved.	
		Dolla.	Cts.

_____,
Referee in Bankruptcy.

¹As to the referee's duty to keep a record of all proceedings in each case before him, see §42; and as to his duty to forthwith transmit lists of proved claims to the clerk, Rule XXIV.

[FORM No. 20.]

**General Letter of Attorney in Fact when Creditor is not
Represented by Attorney at Law.¹**In the District Court of the United States for the ———
District of ———.

In the matter of

Bankrupt .

In Bankruptcy.

To ————:

I, ————, of ————, in the county of ———— and State of ————, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the ——— day of ———, A. D. 19—.

Signed, sealed, and delivered in the presence of ———— [L. S.]

Acknowledged before me this ——— day of ———, A. D. 19—.

[Official character.]

¹As to definition of "creditor," see §1(9); as to the conduct of proceedings in bankruptcy, Rule IV; and as to the execution of letters of attorney to represent creditors, Rule XXI(5). See also §20 as to persons before whom oaths may be taken.

[FORM NO. 21.]

Special Letter of Attorney in Fact.¹

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

To ————:

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at ———, on the ——— day of ———, before ———, or any adjournment thereof, and then and there ——— for ——— and in ——— name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

—————. [L. S.]

In witness whereof I have hereunto signed my name and affixed my seal the ——— day of ———, A. D. 19—.

Signed, sealed, and delivered in presence of

Acknowledged before me this ——— day of ———, A. D. 19—.

[Official character.]

¹See references to Form 20.

[FORM No. 22.]

Appointment of Trustee by Creditors.¹

In the District Court of the United States for the——
District of——.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

At ——, in said district, on the —— day of ——, A. D. 19——, before ——, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting do hereby appoint ——, of ——, in the county of —— and State of ——, to be the trustee— of the said bankrupt's estate and effects.

Signature of creditors.	Residences of the same.	Amount of debt.	
		Dolla.	Cts.

Ordered that the above appointment of trustee— be, and the same is hereby approved. .

_____,
Referee in Bankruptcy.

¹As to appointment of trustees, see §§2(17), 44. Rules XIII, XIV, XV; as to their qualifications, §45. See also §55 as to meetings of creditors; §56 as to voters at such meetings; and §58 and Rule XXI(2) as to notices to which creditors are entitled.

[FORM No. 23.]

Appointment of Trustee by Referee.¹

In the District Court of the United States for the——
District of——.

In the matter of

Bankrupt .

} In Bankruptcy.

At ——, in said district, on the — - day of ——, A. D. 19—,
before ——, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint — - —, of——, in the county of —— and State of ——, as trustee of the same.

_____,
Referee in Bankruptcy.

¹See references to Form 22.

[FORM NO. 24.]

Notice to Trustee of his Appointment.¹

In the District Court of the United States for the——
District of ——.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

To ——, of ——, in the county of ——, and district aforesaid:

I hereby notify you that you were duly appointed trustee [or one of the trustees] of the estate of the above-named bankrupt at the first meeting of the creditors, on the —— day of ——, A. D. 19——, and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at —— dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at —— the —— day of ——, A. D. 19——.

Referee in Bankruptcy.

¹As to notice to trustee of his appointment, see Rule XVI; and as to the bond to be given by him when he qualifies, §506 and the next Form.

[FORM No. 25.]

Bond of Trustee.¹

Know all men by these presents: That we, ———, of ———, as principal, and ———, of ———, and ———, of ———, as sureties, are held and firmly bound unto the United States of America, in the sum of ——— dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——— day of ———, A. D. 19—.

The condition of this obligation is such, that whereas the above-named ——— was, on the ——— day of ———, A. D. 19—, appointed trustee in the case pending in bankruptcy in said court, wherein ——— is the bankrupt, and he, the said ———, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said ———, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in
presence of

_____, [SEAL]
_____, [SEAL]
_____, [SEAL]

¹As to bonds of trustees, see § 506 and the next Form.

[Form No. 26.]

Order Approving Trustee's Bond.¹

At a court of bankruptcy, held in and for the _____ District of _____, at _____, _____, this _____ day of _____, 19____.

Before _____, referee in bankruptcy, in the District Court of the United States for the _____ District of _____.

In the matter of

Bankrupt .

} In Bankruptcy.

It appearing to the Court _____, of _____, and in said district, has been duly appointed trustee of the estate of the above-named bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the creditors [*or by order of the court*], to wit, in the sum of _____ dollars, it is ordered that the said bond be, and the same is hereby, approved.

_____,
Referee in Bankruptcy.

¹ As to trustee's bond, see §506 and the next Form.

[FORM No. 27.]

Order That no Trustee be Appointed.¹

**In the District Court of the United States for the———
District of———.**

In the matter of

Bankrupt .

} **In Bankruptcy.**

It appearing that the schedule of the bankrupt discloses no assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

_____,
Referee in Bankruptcy.

¹As to cases in which no trustee need be appointed, see Rule XV.

[FORM No. 28.]

Order for Examination of Bankrupt.¹

In the District Court of the United States for the——
District of——.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

At ——, on the —— day of ——, A. D. 19——.

Upon the application of ——, trustee of said bankrupt [or creditor of said bankrupt], it is ordered that said bankrupt attend before ——, one of the referees in bankruptcy of this court, at —— on the —— day of ——, at — o'clock in the —— noon, to submit to examination under the acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

_____,
Referee in Bankruptcy.

¹As to the duty of bankrupts to attend meetings of creditors and submit to examination, see §7a(1, 9); as to his duty to appear in court as a witness for examination, §21a; Rule XII(1).

[FORM No. 29.]

Examination of Bankrupt or Witness.¹

In the District Court of the United States for the ———
District of ———.

 In the matter of

Bankrupt .

} In Bankruptcy.

At ———, in said district, on the ——— day of ———, A. D. 19——,
before ———, one of the referees in bankruptcy of said
court.

———, of ———, in the county of ———, and State of
———, being duly sworn and examined at the time and place
above mentioned, upon his oath says: [*Here insert substance of
examination of party.*]

———,
Referee in Bankruptcy.

¹As to examination and testimony of bankrupts, see §§7a(1, 9), 21, Rule XXII.
See also §41 as to contempts before referees.

[FORM No. 30.]

Summons to Witness.¹

To _____:

Whereas _____, of _____, in the county of _____ and State of _____, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the District Court of the United States for the _____ District of _____.

These are to require you, to whom this summons is directed, personally to be and appear before _____, one of the referees in bankruptcy of the said court, at _____, on the _____ day of _____, at _____ o'clock in the _____ noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable _____ Judge of said court, and the seal thereof, at _____, this _____ day of _____, A. D. 19____.

_____, Clerk.

Return of Summons to Witness.

In the District Court of the United States for the _____ District of _____.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

On this _____ day of _____, A. D. 19____, before me came _____, of _____, in the county of _____ and State of _____, and makes oath, and says that he did, on _____, the _____ day of _____, A. D. 19____, personally serve _____, of _____, in the county of _____ and State of _____, with a true copy of the summons hereto annexed, by delivering the same to him; and he further makes oath and says that he is not interested in the proceeding in bankruptcy named in said summons.

Subscribed and sworn to before me this _____ day of _____, A. D. 19____.

_____,²

¹As to orders to require the attendance of witnesses, see §21; and as to the test and process, Rule III.

²As to persons before whom oaths may be taken, see §20.

[FORM No. 31.]

Proof of Unsecured Debt.¹

In the District Court of the United States for the ———
District of .

In the matter of

Bankrupt .

} In Bankruptcy.

At ———, in said district of ———, on the ——— day of ———, A. D. 19—, came ———, of ———, in the county of ———, in said district of ———, and made oath, and says that ———, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of ——— dollars; that the consideration of said debt is as follows:

that no part of said debt has been paid [except _____];²

that there are no set-offs or counter-claims to the same [except _____];

and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

Creditor.

Subscribed and sworn to before me this ——— day of ———, A. D. 19—.

Official character.]

¹As to proof and allowance of claims, see §57 and Rule XXI(1). See also §20 as to persons before whom oaths may be taken.

²The allegation that no note has been received for such account, nor any judgment rendered thereon, should be incorporated in this form to make it comply with Rule XXI(1), if it is a fact that no note has been received. If one has been, then the allegation should be so modified as to state the fact, and the note should be filed with the proof (§57⁶). If it is desired to compute interest on the claim, then a further allegation should be made setting out the time when the debt became due, or will become due, and if the claim consists of items maturing at different dates, the average due date should be stated [Rule XXI(1)].

[FORM No. 32.]

Proof of Secured Debt.¹

In the District Court of the United States for the ———
District of———.

In the matter of <i>Bankrupt</i> .	}	In Bankruptcy.
---	---	----------------

At——, in said district of——, on the——day of——, A. D. 19——, came——, of——, in the county of——, in said district of——, and made oath, and says that——, the person by [*or against*] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of——dollars; that the consideration of said debt is as follows:

 that no part of said debt has been paid [except_____];
 that there are no set-offs or counter-claims to the same [except_____]; and that the only securities held by this deponent for said debt are the following:_____

_____,
Creditor.

Subscribed and sworn to before me this —— day of ——,
A. D. 19——.

_____,
[Official character.]

¹As to proof and allowance of claims, see §57 and Rule XXI. Also §20 as to persons before whom oaths may be taken.

[FORM NO. 33.]

Proof of Debt Due Corporation.¹

In the District Court of the United States for the _____
District of _____.

In the matter of

Bankrupt .

} In Bankruptcy.

At _____, in said district of _____, on the _____ day of _____, A. D. 19____, came _____, of _____, in the county of _____ and State of _____, and made oath and says that he is _____ of the _____, a corporation incorporated by and under the laws of the State of _____, and carrying on business at _____, in the county of _____ and State of _____, and that he is duly authorized to make this proof, and says that the said _____, the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of he said petition, and still is, justly and truly indebted to said corporation in the sum of _____ dollars; that the consideration of said debt is as follows:

that no part of said debt has been paid [except _____];

]; that there are no set-offs
or counterclaims to the same [except _____];

]; and that said corporation has
not, nor has any person by its order, or to the knowledge or
belief of said deponent, for its use, had or received any manner
of security for said debt whatever.

of said Corporation.
Subscribed and sworn to before me this _____ day of _____,
A. D. 19____.

[Official character.]

¹See references to Form 32.

[FORM NO. 34.]

Proof of Debt by Partnership.¹

In the District Court of the United States for the _____
District of _____.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

At _____, in said district of _____, on the _____ day of _____, A. D. 19____, came _____, of _____, in the county of _____, in said district of _____, and made oath and says that he is one of the firm of _____, consisting of himself and _____, of _____, in the county of _____ and State of _____; that the said _____, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of _____ dollars; that the consideration of said debt is as follows:

_____;
that no part of said debt has been paid [except _____];
that there are no set-offs or counterclaims to the same [except _____]; and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

_____,
Creditor.

Subscribed and sworn to before me this _____ day of _____, A. D. 19____.

_____,
[*Official character.*]

¹See references to Form 32.

[FORM No. 35.]

Proof of Debt by Agent or Attorney.¹

In the District Court of the United States for the _____
District of _____.

In the matter of _____

Bankrupt .

In Bankruptcy.

At _____ in said district of _____ on the _____ day of _____
A. D. 19____, came _____, of _____, in the county of _____,
and State of _____, attorney [*or* authorized agent] of _____, in
the county of _____, and State of _____, and made oath and says
that _____, the person by [*or* against] whom a petition for
adjudication of bankruptcy has been filed, was, at and before the
filing of said petition, and still is, justly and truly indebted to
the said _____, in the sum of _____ dollars; that the consider-
ation of said debt is as follows: _____

_____ ;
that no part of said debt has been paid [except _____]
];
and that this deponent has not, nor has any person by his order,
or to this deponent's knowledge or belief, for his use had or
received any manner of security for said debt whatever. And
this deponent further says, that this deposition can not be made
by the claimant in person because _____

_____ ,
and that he is duly authorized by his principal to make this
affidavit, and that it is within his knowledge that the aforesaid
debt was incurred as and for the consideration above stated,
and that such debt, to the best of his knowledge and belief, still
remains unpaid and unsatisfied.

Subscribed and sworn to before me this _____ day of _____,
A. D. 19____.

[*Official character.*]

¹See references to Form 32.

[FORM No. 36.]

Proof of Secured Debt by Agent.¹

In the District Court of the United States for the——
District of——.

In the matter of

Bankrupt .

In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 19——, came ——, of ——, in the county of ——, and State of ——, attorney [*or* authorized agent] of ——, in the county of ——, and State of ——, and made oath, and says that ——, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to the said —— in the sum of —— dollars; that the consideration of said debt is as follows:

-----;
that no part of said debt has been paid [except -----];

-----;
that there are no set-offs or counterclaims to the same [except -----];

and that the only securities held by said —— for said debt are the following:-----

-----;
and this deponent further says that this deposition cannot be made by the claimant in person because:-----

-----,
and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the afore-said debt was incurred as and for the consideration above stated.

-----.
Subscribed and sworn to before me this —— day of ——, A. D. 19——.

[*Official character.*]

¹See references to Form 32.

[FORM NO. 37.]

Affidavit of Lost Bill, or Note.¹

In the District Court of the United States for the——
District of——.

In the matter of	}	In Bankruptcy.
Bankrupt .		

On this——day of——, A. D. 19——, at——, came——, of——, in the county of——, and State of——, and makes oath and says that the bill of exchange [*or note*], the particulars whereof are underwritten, has been lost under the following circumstances, to wit,——

and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said——, or any person or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [*or note*], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

Bill or note above referred to.

Date.	Drawer or Maker.	Acceptor.	Sum.

Subscribed and sworn to before me this——day of——, A. D. 19——.

(*Official character.*)

¹See references to Form 32.

[FORM No. 38.]

Order Reducing Claim.¹

In the District Court of the United States for the——
District of ——.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

At ——, in said district, on the —— day of ——, A. D. 19——.

Upon the evidence submitted to this court upon the claim of —— against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that the amount of said claim be reduced from the sum of ——, as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of ——, and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest*, with interest thereon from the —— day of ——, A. D. 19——].

_____,
Referee in Bankruptcy.

¹As to re-examination, reduction or disallowance of claims, see §§2(2), 57d, f, k, l, and Rule XXI(6).

[FORM No. 39.]

Order Expunging Claim.¹

In the District Court of the United States for the——
District of——.

In the matter of

Bankrupt .

} In Bankruptcy.

At — —, in said district, on the — — day of — —, A. D.
19—.

Upon the evidence submitted to the court upon the claim of
—— against said estate [and, *if the fact be so*, upon hearing
counsel thereon], it is ordered, that said claim be disallowed and
expunged from the list of claims upon the trustee's record in
said case.

_____,
Referee in Bankruptcy.

¹See references to Form 38.

[FORM NO. 40.]

**List of Claims and Dividends to be Recorded by Referee
and by him Delivered to Trustee.¹**

In the District Court of the United States for the _____
District of _____.

In the matter of <i>Bankrupt</i> .	}	In Bankruptcy.
---	---	----------------

At _____, in said district, on the _____ day of _____, A. D.
19____.

*A list of debts proved and claimed under the bankruptcy of _____, with _____
dividend at the rate of _____ per cent. this day declared thereon by _____,
a referee in Bankruptcy.*

No.	Creditors. <small>[To be placed alphabetically, and the names of all the parties to the proof to be care- fully set forth.]</small>	Sum Proved.		Dividend.	
		Dollars.	Cents.	Dollars.	Cents.

Referee in Bankruptcy.

¹As to the duty of the referee to declare dividends, see §39a(1); as to the declaration and payment thereof, §§47a, 65; and as to the notice to creditors of the declaration and time of payment, §58a(5).

[FORM No. 41.]

Notice of Dividend.¹

In the District Court of the United States for the——
District of——.

In the matter of	}	In Bankruptcy.
Bankrupt .		

At ——, on the —— day of ——, A. D. 19——.
To ——,
Creditor of ——, bankrupt:

I hereby inform you that you may, on application at my office, ——, on the —— day of ——, or on any day thereafter, between the hours of ——, receive a warrant for the —— dividend due to you out of the above estate. If you cannot personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter. ——,
Trustee.

Creditor's Letter to Trustee.

To ——,
Trustee in bankruptcy of the estate of ——,
bankrupt:

Please deliver to —— the warrant for dividend payable out of the said estate to me.

——,
Creditor.

¹See references to Form 40.

[FORM No. 42.]

Petition and Order for Sale by Auction of Real Estate.¹

In the District Court of the United States for the——
District of ——.

In the matter of	}	In Bankruptcy.
Bankrupt .		

Respectfully represents——, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit: *[here describe it and its estimated value]* should be sold by auction, in lots or parcels, and upon terms and conditions, as follows:

Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this —— day of ——, A. D. 19——.

_____,
Trustee.

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat *[or after hearing* —— *in favor of said petition and* —— *in opposition thereto]*, it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition, by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 19——.

_____,
Referee in Bankruptcy.

¹As to the sale of real and personal property, see §706 and Rule XVIII. See also as to notice to be given creditors of proposed sales of property, §58a(4).

[FORM NO. 43.]

**Petition and Order for Redemption of Property
from Lien.¹**

In the District Court of the United States for the _____
District of _____.

In the matter of

Bankrupt .

In Bankruptcy.

Respectfully represents _____, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [*or, if the property be personal property, has been pledged or deposited and is subject to a lien*] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of _____, being the amount of said lien, in order to redeem said property therefrom.

Dated this _____ day of _____, A. D. 19.

_____, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing _____ in favor of said petition and _____ in opposition thereto*], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of _____, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this _____ day of _____, A. D. 19.

_____,
Referee in Bankruptcy.

¹As to redemption of property and compounding of claims, see Rule XXVIII.

[FORM No. 44.]

Petition and Order for Sale Subject to Lien.¹

In the District Court of the United States for the——
District of——.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

Respectfully represents ———, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien, or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this—— day of ——, A. D. 19——.

———, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing*——— in favor of said petition and —— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [*or at private sale*], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 19——.

———, *Referee in Bankruptcy.*

¹As to the sale of property, see §706, Rule XVIII; as to notice thereof to creditors, §58a(4).

[FORM No. 45.]

Petition and Order for Private Sale.¹

In the District Court of the United States for the _____
 District of _____

In the matter of _____

Bankrupt .

} In Bankruptcy.

Respectfully represents _____, duly appointed trustee
 of the estate of the aforesaid bankrupt.

That for the following reasons, to wit, _____

it is desirable and for the best interest of the estate to sell
 at private sale a certain portion of the said estate, to wit:

Wherefore he prays that he may be authorized to sell the
 said property at private sale.

Dated this _____ day of _____, A. D. 19—.

_____, *Trustee.*

The foregoing petition having been duly filed and having
 come on for a hearing before me, of which hearing ten days'
 notice was given by mail to creditors of said bankrupt, now,
 after due hearing, no adverse interest being represented thereat
 [or after hearing _____ in favor of said petition and
 _____ in opposition thereto], it is ordered that the said
 trustee be authorized to sell the portion of the bankrupt's
 estate specified in the foregoing petition, at private sale, keeping
 an accurate account of each article sold and the price received
 therefor and to whom sold; which said account he shall file at
 once with the referee.

Witness my hand this _____ day of _____, A. D. 19—.

_____,
Referee in Bankruptcy.

¹See references to Form 44.

[FORM No. 46.]

**Petition and Order for Sale of Perishable
Property.¹**

In the District Court of the United States for the _____
District of _____.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

Respectfully represents _____ the said bankrupt, [*or* a creditor, *or* the receiver, *or* the trustee of the said bankrupt's estate]

That a part of the said estate, to wit, _____

_____ now in _____, is perishable, and that there will be a loss if the same is not sold immediately.

Wherefore, he prays the court to order that the same be sold immediately as aforesaid.

Dated this _____ day of _____, A. D. 19—.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt, [*or* without notice to the creditors] now, after due hearing, no adverse interest being represented thereat, [*or* after hearing _____ in favor of said petition and _____ in opposition thereto] I find that the facts are as above stated, and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this _____ day of _____, A. D. 19—.

Referee in Bankruptcy.

¹See references to Form 44.

[FORM No. 47.]

Trustee's Report of Exempted Property.¹

In the District Court of the United States for the ———
 District of ———

In the matter of	} In Bankruptcy.
<i>Bankrupt</i> .	

At ———, on the ——— day of ———, 19—.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy.

General head.	Particular description.	Value.	
		Dolls.	Cts.
Military uniform, arms, and equipments			
Property exempted by State Laws.			

_____,
Trustee.

¹As to exemptions of bankrupts, see §6; as to bankrupt's duty to claim them, §7a(8); as to the trustee's duty to set the exemptions apart, §47a(11) and Rule XVII.

[Form No. 48.]

Trustee's Return of No Assets.¹

In the District Court of the United States for the ———
District of ———.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

At ———, in said district, on the ——— day of ———
A. D. 19—.

On the day aforesaid, before me comes ——— ———, of
———, in the county of ——— and State of ———, and makes
oath, and says that he, as trustee of the estate and effects of the
above-named bankrupt, neither received nor paid any moneys
on account of the estate.

Subscribed and sworn to before me at ———, this ——— day
of ———, A. D. 19—.

Referee in Bankruptcy.

¹See §47 and Rule XVII as to duties of trustees.

[FORM No. 50.]

Oath to Final Account of Trustee.¹

In the District Court of the United States for the —
District of —.

In the matter of	}	In Bankruptcy.
Bankrupt .		

On this — day of —, A. D. 19—, before me comes —, of —, in the county of — and State of —, and makes oath, and says that he was, on the — day of —, A. D. 19—, appointed trustee of the estate and effects of the above named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed, containing — sheets of paper, the first sheet whereof is marked with the letter — [*reference may here also be made to any prior account filed by said trustee*], is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt, and that the payments purporting in such account to have been made by said trustee have been so made by him. And he asks to be allowed for said payments and for commissions and expenses as charged in said accounts.

—, *Trustee.*

Subscribed and sworn to before me at —, in said — district of —, this — day of —, A. D. 19—.

—,
Official character.

¹See references to Form 49, also §20 as to persons before whom oaths or affirmations may be taken.

[FORM No. 51.]

Order Allowing Account and Discharging Trustee.¹

**In the District Court of the United States for the ———
District of ———.**

In the matter of	}	In Bankruptcy.
<i>Bankrupt .</i>		

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered, that the same be allowed, and that the said trustee be discharged of his trust.

Referee in Bankruptcy.

¹See references to Form 49.

[FORM NO. 52.]

Petition for Removal of Trustee.¹

In the District Court of the United States for the _____
District of _____.

In the matter of	}	In Bankruptcy.
Bankrupt .		

To the Honorable _____,
Judge of the District Court for the _____ District of _____:

The petition of _____, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that _____, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following, to wit: [*here set forth the particular cause or causes for which such removal is requested.*]

Wherefore _____ pray— that notice may be served upon said _____, trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

¹As to appointment and removal of trustee, see §§2(17), 44, 46, and Rule XIII. See also §58 and Rule XXI(2) as to notices to creditors.

[FORM No. 53.]

Notice of Petition for Removal of Trustee.¹

In the District Court of the United States for the _____
 District of _____.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

At _____, on the ____ day of _____, A. D. 19—.

To _____,

Trustee of the estate of _____, bankrupt:

You are hereby notified to appear before this court, at _____, on the ____ day of _____, A. D. 19—, at ____ o'clock ____ m., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of _____, one of the creditors of said bankrupt, filed in this court on the ____ day of _____, A. D. 19—, in which it is alleged [*here insert the allegation of the petition*].

_____,
Clerk.

¹See references to Form 52.

[FORM No. 54.]

Order for Removal of Trustee.¹

In the District Court of the United States for the _____
District of _____.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

Whereas _____, of _____, did, on the _____ day of _____, A. D. 19—, present his petition to this court, praying that for the reasons therein set forth, _____ the trustee of the estate of said _____, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said _____ and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said _____ be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said _____, trustee [*or* out of the estate of the said _____, subject to prior charges].

Witness the Honorable _____, judge of the said court, and the seal thereof, at _____, in said district, on the _____ day of _____, A. D. 19—.

{ Seal of
the court. }

_____,
Clerk.

¹See references to Form 52.

[FORM No. 55.]

Order for Choice of New Trustee.¹

In the District Court of the United States for the _____
 District of _____.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

At _____, on the ____ day of _____, A. D. 19—.

Whereas, by reason of the removal [*or the death or resignation*] of _____, heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee,

It is ordered, that a meeting of the creditors of said bankrupt be held at _____, in _____, in said district, on the ____ day of _____, A. D. 19—, for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

_____,
Referee in Bankruptcy.

¹See references to Form 52.

[FORM No. 56.]

Certificate by Referee to Judge.¹

In the District Court of the United States for the _____
 District of _____.

In the matter of	}	In Bankruptcy.
Bankrupt .		

I, _____, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon.

Dated at _____, the _____ day of _____, A. D. 19____.

Referee in Bankruptcy.

¹This form is used by the referee in cases to be reviewed by the judge. As to the petition for review by the judge, see §§24b, 38a, and Rule XXVII. See also §39a(5) as to what the referee is to return with this certificate.

[FORM No. 57.]

Bankrupt's Petition for Discharge.¹

In the matter of	}	In Bankruptcy.
Bankrupt .		

To the Honorable _____,
 Judge of the District Court of the United States
 for the District of _____.

_____, of _____, in the county of _____ and State of _____, in said district, respectfully represents that on the _____ day of _____, last past, he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this _____ day of _____, A. D. 19—.

_____, *Bankrupt*.

Order of Notice Thereon.²

District of _____, ss.:

On this _____ day of _____, A. D. 19—, on reading the foregoing petition, it is—

Ordered by the court, that a hearing be had upon the same on the _____ day of _____, A. D. 19—, before said court, at _____, in said district, at _____ o'clock in the _____ noon; and that notice thereof be published in _____, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

¹As to the granting of discharges in bankruptcy, see §14; as to revocation of discharges, §16; as to debts not affected by a discharge, §17. Discharges are to be granted by the judge, the referee having no jurisdiction in questions arising out of application for a discharge or composition (§38a[4]).

²As to notice of proceedings to be given creditors, see §58 and Rule XXI(2). See also §20 as to persons before whom oaths or affirmations may be taken.

And it is further ordered by the court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable _____, judge of the said court, and the seal thereof, at _____, in said district, on the _____ day of _____, A. D. 19—.

{ Seal of
the court. }

_____,
Clerk.

_____ hereby depose, on oath, that the foregoing order was published in the _____ on the following _____ days, viz:

On the _____ day of _____ and on the _____ day of _____, in the year 19—.

District of _____.

_____, 19—.

Personally appeared _____, and made oath that the foregoing statement by him subscribed is true.

Before me,

_____,
[Official character.]

I hereby certify that I have on this _____ day of _____, A. D. 19—, sent by mail copies of the above order, as therein directed.

_____,
Clerk.

[FORM No. 59.]

Discharge of Bankrupt.¹

District Court of the United States,

_____ District of _____.

Whereas, _____, of _____, in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said _____ be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the _____ day of _____, A. D. 19—, on which day the petition for adjudication was filed _____ him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable _____, judge of said district court, and the seal thereof this _____ day of _____, A. D. 19—.

{ Seal of
the court }

_____,
Clerk.

¹See references to Form 57.

[FORM No. 60.]

Petition for Meeting to Consider Composition.¹

District Court of the United States for the _____
 District of _____.

	}	In Bankruptcy.
<i>Bankrupt</i> .		

To the Honorable _____, Judge of the District
 Court of the United States for the _____ District of
 _____:

The above named bankrupt— respectfully represent— that
 a composition of _____ per cent. upon all unsecured debts,
 not entitled to priority _____ in satisfaction of _____
 debts has been proposed by _____ to _____ creditors, as provided
 by the acts of Congress relating to bankruptcy, and _____ verily
 believe— that the said composition will be accepted by a majority
 in number and in value of _____ creditors whose claims are
 allowed.

Wherefore, —he— pray— that a meeting of _____ creditors
 may be duly called to act upon said proposal for a composition,
 according to the provisions of said acts and the rules of court.

_____,
Bankrupt.

¹As to when compositions are confirmed, see §12 and Rule XII(3). See also
 reference to Form 58 as to opposition to the confirmation, and §13 as to when
 compositions are set aside.

[FORM No. 61.]

Application for Confirmation of Composition.¹

In the District Court of the United States for the _____
 District of _____.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

To the Honorable _____, Judge of the District
 Court of the United States for the _____ District
 of _____.

At _____, in said district, on the _____ day of _____
 A. D. 19____, now comes _____, the above named
 bankrupt, and respectfully represents to the court that, after
 he had been examined in open court [*or at a meeting of his*
creditors] and had filed in court a schedule of his property and
 a list of his creditors, as required by law, he offered terms of
 composition to his creditors, which terms have been accepted
 in writing by a majority in number of all creditors whose claims
 have been allowed, which number represents a majority in
 amount of such claims; that the consideration to be paid by the
 bankrupt to his creditors, the money necessary to pay all debts
 which have priority, and the costs of the proceedings, amounting
 in all to the sum of _____ dollars, has been deposited, subject
 to the order of the judge, in the _____ National Bank, of
 _____, a designated depository of money in bankruptcy cases.

Wherefore the said _____ respectfully asks that
 the said composition may be confirmed by the court.

_____,
Bankrupt.

¹As to the confirmation of a composition, see §12; as to the debts which are releas-d on the confirmation of a composition §14*b*; as to opposition to confirmation, §12*c*, §14*b* and Rule XXXII; as to when a composition will be set aside, §13; and as to notice of application to confirm composition to be given creditors, §38*a*(2) and Rule XXI(2).

[Form No. 62.]

Order Confirming Composition.¹

In the District Court of the United States for the _____
 District of _____.

In the matter of

}	In Bankruptcy.
---	----------------

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness the Honorable _____, judge of said court,
 and the seal thereof, this _____ day of _____, A. D. 19—.

{ Seal of
 the court. }

_____, Clerk.

¹See references to Form 61.

[FORM No. 63.]

Order of Distribution on Composition.¹

UNITED STATES OF AMERICA :

In the District Court of the United States for the _____
District of _____.

In the matter of	}	In Bankruptcy.
<i>Bankrupt</i> .		

The composition offered by the above-named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings; 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order.

Witness the Honorable _____, judge of said court, and the seal thereof, this _____ day of _____, A. D. 19—.

{ Seal of
the court. }

_____, Clerk.

¹See references to Form 61



APPENDIX "A."

Names of the Judges and Clerks of the Courts of Bankruptcy, and Official Addresses of the Clerks.

DISTRICT.	JUDGE.	CLERK.	CLERK'S ADDRESS.
Alabama, northern.....	John Bruce.....	N. W. Trimble.....	Birmingham.
Alabama, middle.....	John Bruce.....	Joseph W. Dimmick.....	Montgomery.
Alabama, southern.....	Harry T. Toulmin.....	Richard Jones.....	Mobile.
Alaska, 1st Division.....	Melville C. Brown.....	Clk. U. S. Court.....	Juneau.
Alaska, 2d Division.....	James Wickersham.....	Clk. U. S. Court.....	St. Michaels.
Alaska, 3d Division.....	Arthur H. Noyes.....	Clk. U. S. Court.....	Eagle City.
Arizona, first.....	George R. Davis.....	Clinton D. Hoover.....	Tucson.
Arizona, second.....	Fletcher M. Doan.....	Daniel C. Stevens.....	Florence.
Arizona, third.....	Webster Street (Chief Justice).	Edwin S. Gill.....	Phoenix.
Arizona, fourth.....	Richard E. Sloan.....	J. M. Watts.....	Prescott.
Arkansas, eastern.....	John A. Williams.....	{ O. M. Spellman.....	Little Rock.
Arkansas, western.....	John H. Rogers.....	{ Joseph W. Parse.....	Hatesville.
California, northern.....	John J. DeHaven.....	{ Emerson R. Crum.....	Helena.
California, southern.....	Olin Wellborn.....	H. B. Armistead.....	Fort Smith.
Colorado.....	Moses Hallett.....	George E. Morse.....	San Francisco.
Connecticut.....	William K. Townsend.....	Edward H. Owen.....	Los Angeles.
Delaware.....	Edward G. Bradford.....	Francis W. Tupper.....	Denver.
Dist. of Columbia (Sup. Ct.).....	Edward F. Bingham (Ch. J.).....	Edwin E. Marvin.....	Hartford.
Dist. of Columbia (Sup. Ct.).....	Alexander B. Hagner.....	S. Rodmond Smith.....	Wilmington.
Dist. of Columbia (Sup. Ct.).....	Walter S. Cox.....	Washington.
Dist. of Columbia (Sup. Ct.).....	Andrew C. Bradley.....	John R. Young.....
Dist. of Columbia (Sup. Ct.).....	Louis E. McComas.....
Dist. of Columbia (Sup. Ct.).....	Charles C. Cole.....
Florida, northern.....	Charles Swayne.....	Frederick W. Marsh.....	Pensacola.
Florida, southern.....	James W. Locke.....	Eugene O. Locke.....	Jacksonville.

APPENDIX "A"—Continued.

DISTRICT.	JUDGES.	CLERK.	CLERK'S ADDRESS.
Georgia, northern.....	William T. Newman.....	Walter Colquitt Carter.....	Atlanta.
Georgia, southern.....	Emory Speer.....	H. H. King.....	Savannah.
Idaho.....	James H. Beatty.....	Alonso L. Richardson.....	Boise.
Illinois, northern.....	Christian C. Kohlsaat.....	Thomas C. MacMillan.....	Chicago.
Illinois, southern.....	William J. Allen.....	Mervin B. Converse.....	Springfield.
Indiana.....	John H. Baker.....	Noble C. Butler.....	Indianapolis.
Indian Territory, northern.....	William M. Springer.....	James A. Winston.....	Muscogee.
Indian Territory, central.....	William H. H. Clayton.....	E. J. Fannin.....	South McAlester.
Indian Territory, southern.....	Hosea Townsend.....	C. M. Campbell.....	Ardmore.
Iowa, northern.....	Oliver P. Shiras.....	Alonso J. Van Duzee.....	Dubuque.
Iowa, southern.....	Smith McPherson.....	John J. Steadman.....	Council Bluffs.
Kansas.....	William C. Hook.....	Clk. U. S. Court.....	Leavenworth.
Kentucky.....	Walter Evans.....	Thomas Speed.....	Louisville.
Louisiana, eastern.....	Charles Parlange.....	Joseph C. Finnell.....	Covington.
Louisiana, western.....	Aleck Boarman.....	Walter G. Chapman.....	Frankfort.
Maine.....	Nathan Webb.....	John R. Puryear.....	Paducah.
Maryland.....	Thomas J. Morris.....	Frank H. Mortimer.....	New Orleans.
Massachusetts.....	Francis C. Lowell.....	John B. Beattie.....	Shreveport.
Michigan, eastern.....	Henry H. Swan.....	A. H. Davis.....	Portland.
Michigan, western.....	Geo. P. Wauty.....	James W. Chew.....	Baltimore.
Minnesota.....	William Lochren.....	Frank H. Mason.....	Boston.
Mississippi, northern.....	Henry C. Niles.....	Darius J. Davison.....	Detroit.
Mississippi, southern.....	Henry C. Niles.....	John McQueen.....	Grand Rapids.
Missouri, eastern.....	Elmer B. Adams.....	Charles L. Spencer.....	St. Paul.
Missouri, western.....	John F. Phillips.....	J. S. Burton.....	Oxford.
		L. B. Moseley.....	Jackson.
		William Morgan.....	St. Louis.
		George C. Moore.....	Hannibal.
		John M. Nickols.....	Kansas City.
		Charles A. Pollock.....	St. Joseph.
		Henry C. Geisberg.....	Jefferson City.
		Sarah A. Lathim (Miss).....	Springfield.

APPENDIX "A"—Continued.

DISTRICT.	JUSTICE.	CLERK.	CLERK'S ADDRESS.
Montana.....	Hiram Knowles.....	George W. Sproule.....	Helena.
Nebraska.....	William H. Munger.....	Oscar B. Hillis.....	Omaha.
Nevada.....	Thomas P. Hawley.....	T. J. Edwards.....	Carson City.
New Hampshire.....	Edgar Aldrich.....	Fremont E. Shurtliff.....	Concord.
New Jersey.....	Andrew Kirkpatrick.....	George T. Cranmer.....	Trenton.
New Mexico, first.....	John R. McFie.....	Alfred M. Bergere.....	Santa Fe.
New Mexico, second.....	Jonathan W. Crumpacker.....	Harry P. Owen.....	Albuquerque.
New Mexico, third.....	Frank W. Parker.....	James P. Mitchell.....	Silver City.
New Mexico, fourth.....	William J. Mills (Ch. Justice).....	Secundino Romero.....	Las Vegas.
New Mexico, fifth.....	Charles A. Leland.....	William M. Driscoll.....	Socorro.
New York, northern.....	Alfred C. Coxe.....	Charles B. Germain.....	Buffalo.
New York, eastern.....	Edward B. Thomas.....	Richard P. Morle.....	Brooklyn.
New York, southern.....	Addison Brown.....	Samuel H. Lyman.....	New York.
New York, western.....	John K. Hazel.....	Clk. U. S. Court.....	Buffalo.
North Carolina, eastern.....	Thomas R. Purnell.....	Julius B. Fortune.....	Raleigh.
		William H. Shaw (deputy).....	Wilmington.
		George Greene (deputy).....	Newbern.
		W. C. Brooks (deputy).....	Elizabeth City.
		Henry C. Cowles.....	Statesville.
		Cary B. Moore.....	Asheville.
North Carolina, western.....	Hamilton G. Ewart.....	Samuel L. Trogon.....	Greensboro.
		J. A. Montgomery.....	Fargo.
North Dakota.....	Charles F. Amidon.....	H. F. Carleton.....	Cleveland.
Ohio, northern.....	Augustus J. Ricks.....	Benjamin Rush Cowen.....	Cincinnati.
Ohio, southern.....	Albert C. Thompson.....	M. C. Hart.....	Guthrie.
Oklahoma, first.....	John H. Burford (Ch. Justice).....	I. H. Warren.....	El Reno.
Oklahoma, second.....	John C. Tarsney.....	D. B. Sheur.....	Oklahoma City.
Oklahoma, third.....	B. F. Burwell.....	W. F. Harn.....	Perry.
Oklahoma, fourth.....	Bayard T. Hainer.....	I. C. McClelland.....	Pond Creek.
Oklahoma, fifth.....	John L. McAtee.....	Edward D. McKee.....	Portland.
Oregon.....	Charles B. Bellinger.....	Charles S. Lincoln.....	Philadelphia.
Pennsylvania, eastern.....	John B. McPherson.....	William T. Lindsey.....	Pittsburg.
Pennsylvania, western.....	Joseph Buffington.....		

APPENDIX "A"—Continued.

DISTRICT.	JUSTICE.	CLERK.	CLERK'S ADDRESS.
Rhode Island.....	Arthur L. Brown.....	William P. Cross.....	Providence.
South Carolina.....	William H. Brawley.....	Charles J. C. Huisson.....	Charleston.
South Dakota.....	John E. Carland.....	Oliver S. Pendar.....	Sioux Falls.
Tennessee, eastern.....	Charles D. Clark.....	James T. Carter.....	Knoxville.
Tennessee, middle.....	Charles D. Clark.....	Crawford T. Johnson.....	Chattanooga.
Tennessee, western.....	Eli S. Hammond.....	Henry M. Doak.....	Nashville.
Texas, northern.....	Edward R. Meek.....	John B. Clough.....	Memphis.
		H. Finas.....	Waco.
		C. Dart.....	Galveston.
		D. W. Parish.....	Tyler.
Texas, eastern.....	David E. Bryant.....	W. E. Singleton.....	Jefferson.
		A. D. Brooks.....	Paris.
		C. Dart, Jr.....	Beaumont.
Texas, western.....	Thomas S. Maxey.....	D. H. Hart.....	Austin.
Utah.....	John A. Marshall.....	Jerrold R. Leitcher.....	Salt Lake City.
Vermont.....	Hoyt H. Wheeler.....	George E. Johnson.....	Burlington.
		Henry Flegenheimer.....	Richmond.
Virginia, eastern.....	Edmund Waddill, Jr.....	H. S. Ackiss.....	Norfolk.
		John S. Fowler.....	Alexandria.
		A. K. Fletcher.....	Harrisonburg.
Virginia, western.....	John Paul.....	William McCauley.....	Lynchburg.
		Stanley W. Martin.....	Danville.
		Isaac C. Fowler.....	Abingdon.
Washington.....	Cornelius H. Hanford.....	Robert M. Hopkins.....	Seattle.
West Virginia.....	John J. Jackson.....	Jasper Y. Moore.....	Clarksburg.
Wisconsin, eastern.....	William H. Seaman.....	Edward Kurtz.....	Milwaukee.
Wisconsin, western.....	Romanzo Bunn.....	Franklin W. Oakley.....	Madison.
Wyoming.....	John A. Riner.....	Alfred Harrison.....	La Crosse.
		Louis Kirk.....	Cheyenne.

APPENDIX B.

United States Equity Rules.

PRELIMINARY REGULATIONS.

Rule I.—The Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits.

Rule II.—The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course, and applied for, or had by the parties, or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

Rule III.—Any judge of the Circuit Court, as well in vacation as in term, may, at chambers, or, on the rule days, at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

Rule IV.—All motions, rules, orders, and other proceedings made and directed at chambers, or on rule days, at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open, at all office hours, to the free inspection of the parties in any suit in equity, and their solicitors. And except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and

their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders, or other proceedings, not requiring personal service on the parties, in their discretion.

Rule V.—All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions, and for other proceedings in the clerk's office, which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded, by any judge of the court, upon special cause shown.

Rule VI.—All motions for rules or orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted as if not objected to, or refused, in his discretion.

PROCESS.

Rule VII.—The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

Rule VIII.—Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivering up of deeds, or other documents, the decree shall in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

Rule IX.—When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

Rule X.—Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause.

SERVICE OF PROCESS.

Rule XI.—No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

Rule XII.—Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be

placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office, on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.

Rule XIII.—The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person, who is a member or resident in the family.

Rule XIV.—Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until due service is made.

Rule XV.—The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

Rule XVI.—Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

APPEARANCE.

Rule XVII.—The appearance day of the defendant shall be the rule day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise, his appearance day shall be the next rule day succeeding the rule day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.

BILLS TAKEN PRO CONFESSO.

Rule XVIII.—It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule

day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer and is proper to be decreed; or the plaintiff if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

Rule XIX.—When the bill is taken *pro confesso*, the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

FRAME OF BILLS.

Rule XX.—Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship, of all the parties, plaintiffs and defendants by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the Circuit Court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says, that," etc.

Rule XXI.—The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between

the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the plaintiff is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff himself supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit is required, it shall also be specially asked for.

Rule XXII.—If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

Rule XXIII.—The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

Rule XXIV.—Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part, that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

Rule XXV.—In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

SCANDAL AND IMPERTINENCE IN BILLS.

Rule XXVI.—Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recital of deeds, documents, contracts, or other instruments, *in hac verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may on exceptions be referred to a master by any judge of the court for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

Rule XXVII.—No order shall be made by any judge for referring any bill, answer, or pleading, or other matter, or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

AMENDMENT OF BILLS.

Rule XXVIII.—The plaintiff shall be at liberty as a matter of course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties,

misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable reference to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

Rule XXIX.—After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order, from any judge of the court, to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

Rule XXX.—If the plaintiff, so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office, on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

DEMURRERS AND PLEAS.

Rule XXXI.—No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay; and if a plea, that it is true in point of fact.

Rule XXXII.—The defendant may, and any time before the bill is taken for confessed, or afterwards, with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

Rule XXXIII.—The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him, as far as in law and equity they ought to avail him.

Rule XXXIV.—If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

Rule XXXV.—If upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

Rule XXXVI.—No demurrer or plea shall be held bad and be overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

Rule XXXVII.—No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter, as may be covered by such demurrer or plea.

Rule XXXVIII.—If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

ANSWERS.

Rule XXXIX.—The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases, by answer, to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defence. Thus, for example, a *bona fide* purchaser for a valuable consideration, without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

Rule XL.—A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

Ordered (December term, 1850), that the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the Circuit Courts, be and the same is hereby repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so to obtain a discovery.

Rule XLI.—The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following; that is to say—"The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, &c.;" and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864.*

Rule XLII.—The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill; and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

Rule XLIII.—Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder

* See Rev. Stat. §858.

written, they are respectively required to answer; that is to say—

- “1. Whether, &c.
- 2. Whether, &c.”

Rule XLIV.—A defendant shall be at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

Rule XLV.—No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

Rule XLVI.—In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer, on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES TO BILLS.

Rule XLVII.—In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

Rule XLVIII.—Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the

defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

Rule XLIX.—In all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

Rule L.—In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party, where he desires to have the will established against him.

Rule LI.—In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

Rule LII.—Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following, (that is to say:) "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

Rule LIII.—If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

NOMINAL PARTIES TO BILLS.

Rule LIV. — Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

Rule LV.—Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

Rule LVI.—Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representa-

tives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

Rule LVII.—Whenever any suit in equity shall become defective, from any event happening after the filing of the bill, (as, for example, by change of interest in the parties,) or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

Rule LVIII.—It shall not be necessary in any bill of revivor, or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

ANSWERS.

Rule LIX.—Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any master in chancery appointed by any Circuit Court, or before any judge of any court of a State or Territory, or before any notary public.

AMENDMENT OF ANSWERS.

Rule LX.—After an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document or other small matter, and be re-sworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court or of a judge thereof, upon motion and cause shown after due notice to the adverse party,

supported, if required, by affidavit. And in every case where leave is so granted, the court, or the judge granting the same, may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

EXCEPTIONS TO ANSWERS.

Rule LXI.—After an answer is filed on any rule day the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

Rule LXII.—When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

Rule LXIII.—Where exceptions shall be filed to the answer for insufficiency within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court, and shall enter, as of course, in the order book, an order for that purpose. And if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient: *Provided, however,* That the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

Rule LXIV.—If at the hearing the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule day; otherwise, the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions;

and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer and complying with such other terms as the court or judge may direct.

Rule LXV.—If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

REPLICATION AND ISSUE.

Rule LXVI.—Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

TESTIMONY—HOW TAKEN.

Rule LXVII.—After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners may be named by the court, or by a judge thereof; and the presiding judge of the court exercising jurisdiction may either in term time or vacation vest in the clerk of the court general power to name commissioners to take testimony. Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be

examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner, if he so request, to be furnished with a copy of the pleadings; such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; *provided*, that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skillful stenographer or by a skillful type-writer, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; *provided*, that such stenographer or typewriter has been appointed by the court, or is approved by both parties.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; *provided*, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the records the reasons, if any, assigned by the witness for such refusal.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit, and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions, and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties of the time and place of the examination for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record in the same mode as prescribed in section 865 of the Revised Statutes.

Testimony may be taken on commission in the usual way by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defence and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties or by leave of court first obtained, on motion for cause shown.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part of the evidence to be adduced orally in open court on final hearing.

Rule LXVIII.—Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness either under a commission or by a new deposition taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

Rule LXIX.—Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and deposi-

tions containing the testimony, into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances. But, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order books or indorsed upon the deposition or testimony.

TESTIMONY DE BENE ESSE.

Rule LXX.—After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged or infirm, or going out of the country, or that any one of them is a single witness to a material fact the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

FORM OF THE LAST INTERROGATORY.

Rule LXXI.—The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated, in substance, thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

CROSS-BILL.

Rule LXXII.—Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill, at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

Rule LXXIII.—Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the

master, to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

Rule LXXIV.—Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the cost of the party procuring the reference.

Rule LXXV.—Upon every such reference it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reason for any delay.

Rule LXXVI.—In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer, were so brought in or used.

Rule LXXVII.—The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause upon oath touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to

examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

Rule LXXVIII.—Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear, or give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon, by order of the court or any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall in its discretion deem it advisable.

Rule LXXIX.—All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties, who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

Rule LXXX.—All affidavits, depositions, and documents, which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.

Rule LXXXI.—The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both

modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

Rule LXXXII.—The Circuit Courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring in the appointment); and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the Circuit Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

EXCEPTIONS TO REPORT OF MASTER.

Rule LXXXIII.—The master as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the court if the court is then in session; or if not, then at the next sitting of the court which shall be held thereafter by adjournment or otherwise.

Rule LXXXIV.—And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party, whose exceptions are overruled shall, for every exception overruled, pay cost to the other party and for every exception allowed shall be entitled to costs—the costs to be fixed in each case by the court, by a standing rule of the Circuit Court.

DECREES.

Rule LXXXV.—Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

Rule LXXXVI.—In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:" [Here insert the decree or order].

GUARDIANS AND PROCHEIN AMIS.

Rule LXXXVII.—Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons.

Rule LXXXVIII.—Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

Rule LXXXIX.—The Circuit Courts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge of the district, concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby

prescribed, in their discretion, and from time to time alter and amend the same.

Rule XC.—In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

Rule XCI.—Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof, make solemn affirmation to the truth of the facts stated by him.

Rule XCII.—*Ordered* (December Term, 1863), That in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

INJUNCTIONS.

Rule XCIII.—When an appeal from a final decree in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

BILL BY STOCKHOLDER.

Rule XCIV.—Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a col-

lusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

See also the following sections of the act of June 1, 1872:

Sec. 7. That whenever notice is given of a motion for an injunction out of a Circuit or district court of the United States, the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge: Provided, That no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order except within the circuit to which he is allotted, and in causes pending in the circuit to which he is allotted, or in such causes at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application cannot be heard by the circuit judge of the circuit, or the district judge of the district.

Sec. 13. That when in any suit in equity, commenced in any court in the United States, to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable wherever found; or where such personal service is not practicable, such order shall be published in such a manner as the court shall direct; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but such adjudication shall, as regards such absent defendant without appearance, affect his property within such district only.

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